77-2

IN THE

Supreme Court of the United States

October Term, 1976
No. .....

WILLIAM C. WAGGONER, JOHN L. CONNOLLY, HOWARD C. DENNIS, WILLIAM SCHMIDT, and (as successors-in-interest to C. WILLIAM BURKE, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MEIR, JAMES J. KIRST, WILLIAM JERECZEK and E. J. STRECKER) FRANK L. TODD, FREEMAN M. ROBERTS, DALE I. VAWTER, WILLIAM A. COBB, JR., JOHN BEBEK, JERALD B. LAIRD, JOHN C. MAXWELL and ALEXANDER RADOS, *as Trustees of the Operating Engineers Health and Welfare Fund;* JOHN L. CONNOLLY, WILLIAM C. WAGGONER, C. V. HOLDER, HOWARD C. DENNIS, JAMES J. KIRST, JOHN C. MAXWELL, and (as successors-in-interest of JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, ALFRED HARRISON, WILLIAM JERECZEK, E. J. STRECKER, DONALD E. MEIR, and C. WILLIAM BURKE) FRANK L. TODD, FREEMAN M. ROBERTS, DALE I. VAWTER, WILLIAM A. COBB, JR., JOHN BEBEK, and KENNETH J. BOURGUIGNON, *as Trustees of the Operating Engineers Pension Trust;* WILLIAM C. WAGGONER, HOWARD C. DENNIS, C.I.T. JOHNSON, JAMES J. KIRST, ALEXANDER RADOS, and (as successors-in-interest of JOSEPH H. SEYMOUR, RICHARD L. CORBIT, C. WILLIAM BURKE, HAROLD EDWARDS, DONALD E. MEIR, WILLIAM JERECZEK and E. J. STRECKER) FRANK L. TODD, FREEMAN M. ROBERTS, DALE I. VAWTER, WILLIAM A. COBB, JR., JOHN BEBEK and JERALD B. LAIRD, *as Trustees of the Operating Engineers Vacation-Holiday Savings Trust;* WILLIAM SCHMIDT, HOWARD C. DENNIS, C.I.T. JOHNSON, ALEXANDER RADOS, and (as successors-in-interest of JOSEPH H. SEYMOUR, RICHARD L. CORBIT, KENNETH DODY, WILLIAM JERECZEK, ROBERT R. MOODIE, ALLAN ROBERTS, RICHARD GANNON and JERRY TRENT) DALE I. VAWTER, FRANK L. TODD, WILLIAM C. WAGGONER, FREEMAN M. ROBERTS, VERNE W. DAHNKE, WILLIAM A. FLOYD, ROBERT LYTLE and JOHN BEBEK, *as Trustees of the Southern California Operating Engineers Apprentice Training Trust;*

and

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 12; *Petitioners,*

vs.

GRIFFITH COMPANY; J. W. NICKS CONSTRUCTION CO., SECURITY PAVING CO., INC.;

and

NATIONAL LABOR RELATIONS BOARD; *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12;

Petitioners,

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GRIFFITH COMPANY; J. W. NICKS CONSTRUCTION CO., SECURITY PAVING CO., INC.;

and

NATIONAL LABOR RELATIONS BOARD;

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, the International Union of Operating Engineers, Local Union No. 12, and the above-named Trustees of the Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Southern California Operating Engineers Apprentice Training Trust, join herein and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 12, 1977, and re-entered as revised on May 9, 1977, in Case No. 74-2740 of that Court.

Opinions Below.

The opinion of the court of appeals is reported at 545 F.2d 1194 and appears at Appendix A of this petition. The decision and order of the National Labor Relations Board, which was reviewed and reversed by the court of appeals, is reported at 212 NLRB 343 and appears at Appendix B of this petition. The decision of the administrative law judge is reported with the decision and order of the Board and appears at Appendix C of this petition. The Board's Order Correcting Decision and Order appears at Appendix D of this petition. The Board's decision in the unrelated case of *Joint Council of Teamsters No. 42, et al.* (*Merle Riphagen*) to which the dissenting Board members refer is reported at 212 NLRB 320 and appears at Appendix E of this petition.

Jurisdiction.

The opinion of the court of appeals was filed on November 4, 1976. Upon the filing of a timely

petition for rehearing and suggestion for rehearing *en banc* by the petitioners, the court of appeals filed an order on December 14, 1976, requiring Griffith Company, J. W. Nicks Construction Company and Security Paving Co., Inc., to file a written response to the petition for rehearing on or before December 24, 1976. The order filed December 14, 1976, appears at Appendix F of this petition. On April 5, 1977, the court of appeals filed an Amendment of Opinion and Denial of Rehearing which appears at Appendix G of this petition. The Judgment of the court of appeals was filed and entered on April 12, 1977, and re-entered with revisions as to costs on May 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

The questions presented by this petition for writ of certiorari are:

1. May a union use economic pressure to enforce its multiemployer collective bargaining agreement, requiring each employer to pay delinquent contributions owed by its *signatory* subcontractor to Taft-Hartley trusts in which the employees of both employers participate if the date of subcontracting occurs after notice of the delinquency is published, without violating the "secondary boycott" prohibition of Section 8(b)(4)(B) of the National Labor Relations Act [29 U.S.C. § 158 (b)(4)(B)]?

2. Was the petition for review of the decision of the National Labor Relations Board filed in the court of appeals seventy-nine (79) days after the issuance of the Board's decision untimely, considering the sixty (60) day time limit imposed by 28 U.S.C. § 2107?

3. Did the court of appeals improperly refuse to grant the motion to intervene by trustees of Taft-Hartley trusts in proceedings by contributing employers seeking review of a National Labor Relations Board order and invalidation of certain contractual obligations to the trusts arising under the employers' collective bargaining agreement?

Statutes Involved.

The first question presented by this petition involves Section 8(b) of the National Labor Relations Act, 61 Stat. 140, as amended at 73 Stat. 525, 542, 545, 29 U.S.C. § 158(b), which provides in relevant part:

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> . . .
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring

any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *"

The second question presented by this petition involves 62 Stat. 963, as amended at 63 Stat. 104, 28 U.S.C. § 2107, which provides in relevant part:

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

"In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry. * * *"

Statement of the Case.

The Proceedings Below.

On March 8, 1973, unfair labor practice charges were filed by five construction industry employers, including Griffith Company, J. W. Nicks Construction Company and Sec[illegible] Paving Co., Inc., against the International Uni[illegible] of Operating Engineers, Local Union No. 12. The General Counsel of the National Labor Relations Board issued its consolidated complaint on May 7, 1973, alleging that Local 12 was engaging

in violations of Section 8(b)(4)(ii)(B) and Section 8(e) of the National Labor Relations Act. At the opening of the hearing before the administrative law judge on June 21, 1973, a motion to intervene in the proceedings was filed on behalf of the Trustees of the Operating Engineers Health and Welfare Fund, the Operating Engineers Pension Trust, the Operating Engineers Vacation-Savings Trust and the Southern California Operating Engineers Appentice Training Trust. The motion to intervene was granted and, thereafter, the Trustees participated fully in the Board proceedings.

On September 17, 1973, the administrative law judge issued his findings of fact, conclusions of law and recommended order that the complaint be dismissed in its entirety. On June 28, 1974, the Board issued its decision and order affirming and adopting the findings and conclusions of the administrative law judge with stated modifications and additions and dismissed the complaint in its entirety.

On or about September 16, 1974, Griffith, Nicks and Security filed a petition for review of the Board's decision in the court of appeals pursuant to Section 10(f) of the Act [29 U.S.C. § 160(f)]. On or about October 3, 1974, Local 12 filed its motion to intervene in the case, and its motion was granted. On or about October 11, 1974, the Trustees filed a motion to intervene in the court of appeals or, in the event intervention was denied, an alternative motion for leave to file a brief as *amicus curiae*. The court of appeals granted the Trustees leave to file a brief *amicus curiae*, but refused to permit intervention. On December 4, 1974, Local 12 filed a motion to dismiss on grounds

that the petition for review was filed untimely, and the court of appeals denied the motion. The court of appeals heard oral arguments on October 8, 1975, and on November 4, 1976, handed down its opinion reversing and remanding the case to the Board for further proceedings.

The Dispute.

The Trustees receive fringe benefit contributions of about $5 million per month from approximately 2500 employers who are signatory to collective bargaining agreements with Local 12 covering about 40,000 employees in southern California and southern Nevada. In early 1973, field representatives of the Trustees visited construction projects of several signatory employers, including Griffith, Nicks and Security, and found that each had subcontracted work covered by its collective bargaining agreement to another employer known as Urban Pacific. Urban Pacific and Local 12 were parties to a "short form" collective bargaining agreement incorporating by reference the terms of the Master Labor Agreement negotiated between Local 12 and employer associations representing Griffith, Nicks and Security. However, at that time Urban Pacific was delinquent in payments of about $28,000.00 in contributions owed to the Trustees under its collective bargaining agreement. The Trustees then requested payment of the delinquent amount by the signatory general contractors on grounds that the subcontracts with Urban Pacific had been made while Urban Pacific was named as a delinquent employer on the delinquency list published by the Trustees as provided by Article I, Paragraphs B-15 and B-16, of the Master Labor Agree-

ment.[1] When Griffith, Nicks and Security initially refused to pay their pro rata shares of the delinquent amount, they were informed by the Trustees, through counsel, that unless payment were promptly forthcoming, Local 12 would be notified of the need to take economic action against them to recover the amounts due. After partial payment of all but $18,386.46 of Urban Pacific's delinquency, the unfair labor practice charges were filed, and the regional director of the Board obtained a preliminary injunction from the U.S. District Court for the Central District of California

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[1]The disputed clauses are Article I, Paragraphs B-15 and B-16, of the Master Labor Agreement between Local 12 and the Southern California General Contractors, which read as follows:

> "15. The Trustees of the Trust Funds, through their Administrator, shall furnish each Contractor Association and the Union with a list of delinquent Contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquency list unless said Contractor has paid all delinquent monies to the various Trust Funds.
>
> (a) Any disputes between the parties concerning the payment or non-payment of monies due the Trust Funds are not subject to Article V [grievance procedure] of the Agreement.
>
> 16. In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums over to the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Contractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date of the delinquency list on which the Subcontractor's name first appeared. The Contractor shall terminate the contract of the Subcontractor who fails to promptly correct his delinquency.
>
> (a) Where the Contractor fails or refuses to make payment required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor."

under Section 10(1) of the Act [29 U.S.C. § 160(1)] prohibiting economic action by Local 12. After the administrative law judge recommended dismissal of the charges, the district court dissolved the preliminary injunction and, pursuant to demand by the Trustees, the five signatory general contractors then involved paid the delinquent amount.

The Board's Findings of Fact.

The administrative law judge made, and the Board adopted, the most extensive factual findings in the Board's history on the manner in which multiemployer Taft-Hartley trusts function in relation to their participants and contributing employers. Particularly detailed are the findings with respect to employee eligibility for benefits, the concerns of fringe benefit trustees for detecting and controlling employer delinquencies in payment of contributions, and the impact of employer delinquencies on the value of benefits received by employees.

The administrative law judge and the Board found that the trusts in this case provide benefits to participants based upon the extent of covered employment and the related amount of employer contributions obligated by the applicable collective bargaining agreement. The expense of these benefits is paid from funds in the "common pool" held by each trust. If a signatory employer becomes delinquent in payment of the obligated contributions, the Trustees do not withhold benefits otherwise obligated to the employees who worked the hours on which contributions are unpaid. The Trustees try to recover the "account receivable" from the delinquent employer, but if the effort is eventually unsuccessful the loss is attributed to the "common

pool" of the trust, rather than entirely to the employees of the delinquent employer. In this manner, the employee's risk of loss arising from employer delinquency is spread evenly over all participants in each trust. When the "common pool" suffers the detriment of a delinquency loss from one employer, every participant in the trust suffers a pro rata portion of that loss.

The administrative law judge and the Board found that each employee participating in the trusts has a substantial bargaining interest in protecting the economic integrity of contributions obligated to the trusts on his behalf and that the value of these contributions is diminished by the occurrence of delinquencies among employers other than his own. Delinquent signatory employers were found to have an economic advantage to the extent of accrued delinquencies in competitive bidding for subcontracting of unit work. Also, non-delinquent signatory employers were found to have an economic incentive to subcontract their unit work to delinquent employers who, though signatory, evade the payment of fringe benefit contributions. Under these circumstances, the administrative law judge and the Board found that the employees in each bargaining unit represented by Local 12, including the employees of Griffith, Nicks and Security, had substantial interests in bargaining to preserve their unit work by removing the economic incentive of their employers to subcontract unit work to other employers. The disputed clauses were found to have been specifically designed, "within each separate bargaining unit", to promote these direct economic interests of the employees of the bargaining employers in protecting their own contribution "standards" against erosion and in preserving their unit work

against encroachment by delinquent employers (App. C, *infra*, pp. 88a-91a). The cease doing business aspects of the clauses were found to be "purely incidental" to their primary purposes (App. C, *infra*, p. 95a).

The Board's Conclusions of Law.

The administrative law judge and the Board concluded that an employer cannot be regarded as "neutral" with respect to his own employees' interests in preserving their work and protecting the economic integrity of fringe benefit contributions paid on their behalf by their employer. In determining that Griffith, Nicks and Security were not "neutral" employers, the administrative law judge and the Board agreed (1) that the critical question is whether in the circumstances of this case the disputed clauses were substantially in the interest and for the protection of the employees of the employers bound to Local 12's agreement, and (2) that this question must be answered in relation to each separate bargaining unit.[2] The administrative law judge concluded that, because the clauses were reasonably designed to preserve the work and protect the "union standards" of employees of prime contractors (by restricting subcontracting of unit work to another employer who holds an economic advantage arising from non-payment of fringe benefits and whose delinquency to the trusts is causing economic loss to the prime contractor's employees), the "critical question" must be answered affirmatively. The Board agreed, noting the different factual context of this case as involving no possibility of "union signatory" overtones.

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[2]Member Jenkins, concurring in the Board's decision, would have applied the question in relation to a single work unit comprised of all employers contributing to the trusts.

since all subcontractors affected by the disputed clauses are already signatory to an agreement with Local 12. Considering all of the circumstances, the Board stated:

> ". . . [T]his is not a case where the Union has sought to protect the interests of union members generally, whether or not employed by a contracting employer. This agreement and its maintenance is addressed solely to the labor relations of the contracting employers vis-a-vis their own employees. As such, it satisfies the touchstone of legality set forth by the Supreme Court in *National Woodwork* . . .
>
> ". . . We conclude that the agreement of the Charging Parties not to do business with delinquent subcontractors and the trust fund administrator's invocation of that agreement with respect to Urban Pacific was primary conduct, relating directly and immediately to the interests and conditions of employment of the employees in each unit of contracting employers involved in this case. We shall therefore dismiss this complaint in its entirety." (App. B, *infra*, pp. 27a-28a).

The Court of Appeals' Decision.

The court of appeals stated that the administrative law judge had held the disputed clauses lawful as within the "union standards" exception or, alternatively, "within a new exception sanctioned by broad language in *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967)." (App. A, *infra*, p. 7a). In the court of appeals' view, the Board had "implicitly rejected" the "union standards" purposes,

but had embraced the "new exception" to find the disputed clauses lawful. The court of appeals stated that comprehensive general principles for distinguishing primary from secondary agreements had been formulated only for specific types of contractual provisions, including "union standards" and "work preservation" clauses, but that "no such rules dealing with the provisions challenged here have been formulated." (App. A, *infra*, p. 9a). The court of appeals then proceeded to fashion new rules by interpreting this Court's opinion in *National Woodwork* as establishing two distinct "keystone factors": (1) "The tactical object of the agreement and its maintenance", and (2) "The allocation of the benefits of the agreement". (App. A, *infra*, p. 11a).

The court of appeals applied the first of these rules to the facts and found that the tactical objects of the disputed clauses were to pressure subcontractors to pay their delinquencies to the trusts and to provide guarantors for the unpaid delinquencies. The court of appeals found this to be a secondary object because "[the prime contractor's] only offense lies in doing business with [the subcontractor]". (App. A, *infra*, p. 13a). Accordingly, the court of appeals found enforcement of the clauses to be an unwarranted interference with Urban Pacific's [the signatory subcontractor's] "labor relations policy."

In the court of appeals' view, the Board ignored this interference with Urban Pacific's labor relations policy and "focused solely on . . . the allocation of benefits

of the boycott." Moreover, the Board was found to have erred in permitting the clauses to benefit the entire multiemployer bargaining unit[3] to which Griffith, Nicks and Security belong. Instead, the court of appeals ruled, the Board should have regarded benefits as for a primary purpose only if such benefits were for the employees in the "relevant work unit" found appropriate by the court for cases of this nature: *i.e.*, the single employer involved in enforcement of the clauses—Griffith. The court of appeals ruled that any benefit conferred by the clauses upon employees other than Griffith's (the "relevant work unit") was to be regarded as benefit for a secondary purpose. Applying this rule to the evidence in the record, the court of appeals found the clauses to be "secondary" in their allocation of benefits because all trust participants would benefit from payment of Urban Pacific's delinquent contributions, and Griffith's employees comprised only a minor portion of all trust participants. Any benefit to Griffith's employees in the nature of work preservation[4] was regard-

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[3]At one point in its opinion, the court of appeals acknowledges that the Board utilized the statutory bargaining unit as the relevant work unit upon which to apply the primary-secondary examination (App. A, *infra*, p. 14a), but at other points in its opinion the court of appeals argues from the premise that the Board lumped all bargaining units together in a single "work unit" (App. A, *infra*, pp. 15a, 17a, 18a).

[4]The court of appeals is erroneous in stating that "there is no contention that the work subcontracted to Urban Pacific was ordinarily accomplished by Griffith's employees and the administrative law judge did not so find." (App. A, *infra*, p. 17a). All parties *stipulated* that Griffith and each other contractor involved at all times had payroll employees covered by their collective bargaining agreement with Local 12 (App. C, *infra*, p. 79a). The import of this stipulation was to establish, without need for contest, that the unit work fairly preservable by the employees of the prime contractors was coextensive with the work performed under the subcontractor's collective bargaining agreement.

ed as discountable because the court of appeals doubted Local 12's motivation to benefit Griffith's employees at the expense of Urban Pacific's employees, who are also represented by Local 12 (App. A, *infra*, p. 17a, n. 13). The court of appeals observed in conclusion that, while the Board regarded the disputed clauses as "necessary and commendable", the objective of "improving the wages and working conditions of union members generally" is secondary. In weighing the evidence, the court of appeals viewed the disputed clauses as not really "necessary" because Local 12 could have taken strike action against Urban Pacific, could have avoided "dealing with 'fly-by-night' subcontractors altogether", and could have asked (though not demanded) that Urban Pacific provide a security bond for fringe benefit contributions. Thus, declining to create a "new exception to Section 8(e) for secondary fringe benefit trust contribution enforcement clauses", the court of appeals reversed the Board decision and remanded the case to the Board to determine whether the disputed clauses are enforceable by judicial means under the construction proviso to Section 8(e) of the Act, and to determine whether the Trustees are agents of Local 12 in attempting to enforce the disputed clauses on behalf of the trusts.

REASONS FOR GRANTING THE WRIT.

1. The substantive question presented by this petition has great significance to the capacity of the collective bargaining process to provide security for employee fringe benefits through means designed to control delinquencies among contributing employers:[5] Is an employer to be considered "neutral" and "secondary" with respect to his own employees' interests in bargaining (a) to protect the value of their fringe benefits against losses caused by other employers' delinquencies to "common pool" trusts, and (b) to preserve their own work against subcontracting to a delinquent employer? The court of appeals' decision reversing the Board and holding that employees cannot bargain to protect such interests (1) erroneously construes and applies this Court's decision in *National Woodwork, supra,* (2) conflicts with fundamental principles of collective bargaining law governing multiemployer bargaining units, and (3) usurps the Board's statutory role by improperly

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[5]Taft-Hartley multiemployer pension trusts of the nature involved in this case covered 8.5 million employees, plus their families and beneficiaries, with assets estimated at 35 billion dollars at the end of 1976. Other types of Taft-Hartley employee benefit trusts cover millions more employees. A recent report commissioned and published by The Twentieth Century Fund recognizes that delinquent contributions typically amount to 5% or more of total contributions for multiemployer trusts in the construction industry, and that employer delinquency is the most significant problem in the daily administration of such trusts. Although in many respects superficial in its understanding of collective bargaining and trust administration, that report points to disinterest among management trustees, union malfeasance, and *inadequate legal remedies* as reasons for the seriousness of the employer delinquency problem. In that light, it is not surprising that the Board decision in this case described the disputed clauses as "necessary and commendable" efforts to control the delinquency problem. R. Blodgett, *Conflicts of Interests: Union Pension Fund Asset Management,* pp. 10, 41-46, 53, The Twentieth Century Fund, New York, 1977.

substituting the court of appeals' own views of the facts for those of the Board.

This Court recently reconfirmed in *N.L.R.B. v. Enterprise Association, etc., Local Union No. 638,* ..... U.S. ....., 97 S.Ct. 891, 900-901 (1977), the "totality-of-the-circumstances test" recognized in *National Woodwork* for examining whether an employer is truly a "neutral" being pressured in a labor dispute not his own. *Id.,* 386 U.S. at 622-627. The Board well understands this Court's standards for determining neutrality, and properly considered all of the circumstances before concluding that Griffith, Nicks and Security cannot be regarded as "neutrals", or "secondary" employers, in relation to the thrust of the disputed clauses. The court of appeals, on the other hand, created an important distortion of *National Woodwork* by examining the "tactical object" of the clauses as a test separate and distinct from concern for the allocation of benefits conferred by the clauses.[6] Thereby, the court of appeals found the "tactical object" to be "secondary" without first considering whether under all of the circumstances (including the benefits derived) the prime contractors were not neutral employers in relation to the subject addressed by the clauses. Although the

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[6]The "tactical object" test as expressed by the court of appeals is "whether the union means to influence the labor relations of the signatory ('boycotting') employer or to interfere with the labor relations of others (the 'boycotted' employers)". The court of appeals regarded as determinative of this test a "finding" by the administrative law judge that the disputed clauses were designed to pressure delinquent employers to pay their debts to the trusts. In reality, that "finding" was merely a preliminary recitation of the *prima facie* mechanical design of the clauses (App. C., *infra,* pp. 40a-41a) made before the administrative law judge began 34 pages of fact findings and 21 pages of factual analysis devoted to deriving the purpose of the clauses (App. C, *infra,* pp. 41a-74a, 74a-95a).

court of appeals announced its views as new rules applicable to "secondary fringe benefit trust fund enforcement clauses", the court of appeals attempts to re-write long-standing principles which were "recognized"—not newly announced—in *National Woodwork*. See *N.L.R.B. v. Enterprise Ass'n, supra,* 97 S.Ct. at 900-901.

Secondly, the court of appeals adopted a "relevant work unit" (upon which primary benefits may be conferred by the clauses) as coextensive with the single employer (Griffith) against whom the clauses are sought to be enforced. Moreover, while acknowledging some primary benefits to Griffith's employees and discounting others,[7] the court of appeals ruled that any benefits to Griffith's employees must be balanced against the proportion of benefits to employees of all other employers. Since all employees participating in the trusts benefit from collection of a delinquency, the court

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[7]As noted, *supra,* n. 4, the court of appeals completely discounted "work preservation" as a motive for the clauses on grounds that "no contention" or finding was made to that effect, which squarely conflicts with the record. In re-weighing the Board's finding that Local 12 intended to protect the work and standards of Griffith's employees, the court of appeals attributed substantially less weight to that motive because it could not believe Local 12 would wish to benefit Griffith's employees at the expense of other Local 12 members employed by Urban Pacific. That reasoning attributes to unions an inherent conflict of interest in representing more than one bargaining unit, even when all units are covered by identical collective bargaining agreements, and should not be permitted to stand. *Cf. Humphrey v. Moore,* 375 U.S. 335, 349-350, 84 S.Ct. 363, 371-372 (1964).

Moreover, the Trustees' practices of spreading the loss of delinquencies over all trust participants, rather than withholding benefits from employees of delinquent employers, is proper fiduciary conduct which the courts have required of Taft-Hartley trustees. *Blankenship v. Boyle,* 329 F.Supp. 1089, 1104 (D.C. D.C. 1971).

of appeals viewed such benefits to any employee except Griffith's as "secondary" and, thus, the overall distribution of benefits as "secondary". In so ruling, the court of appeals disables unions from bargaining for a concededly primary benefit unless the union can achieve the benefit without conferring benefits on employees of other employers, even when the other employers are in the same multiemployer bargaining unit or signatory to the same agreement. Further, the court of appeals' departure from the statutory bargaining unit to a *smaller* "relevant work unit" for which a union may bargain is unprecedented in any context and particularly inappropriate in the context of area-wide fringe benefit trusts. *A Rational Approach to Secondary Boycotts and Work Preservation,* 57 Va.L. Rev. 1280, 1291-1293 (1971). This ruling deprives unions of the "mirror image" of the employers' right to bargain in a multiemployer bargaining unit for the benefit of all or any part of the unit, which has been regarded as essential to the viability of such units. *N.L.R.B. v. Brown,* 380 U.S. 278, 85 S.Ct. 980 (1965); *N.L.R.B. v. Truck Drivers Union (Buffalo Linen)*, 353 U.S. 87, 77 S.Ct. 643 (1957).

Having derived erroneous legal standards for application to the case, the court of appeals compounded its error by then itself purporting to assess the facts in light of the newly announced standards. If the Board did not apply the proper rules of law in reaching its decision, the duty of the court of appeals was to "correct the error of law committed by that body, and, after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law."

N.L.R.B. v. Enterprise Ass'n, supra, 97 S.Ct. at 900 (n. 9). If, on the other hand, the Board made no errors of law, the scope of review by the court of appeals should have been limited to determining whether the Board's findings could be sustained as supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *N.L.R.B. v. Enterprise Ass'n, supra,* 97 S.Ct. at 905; *Universal Camera Corporation v. N.L.R.B.,* 340 U.S. 474, 71 S.Ct. 456 (1951). The court of appeals took neither of these approaches and, instead, substituted its own views of the facts for those of the Board by applying its newly fashioned legal standards to the evidence and concluding that the disputed clauses are secondary and unlawful.

The concern of Congress for the security of employee benefit plans has been resoundingly expressed by the nearly unanimous enactment of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1001 *et seq.*], and concern is mounting for the inadequacy of legal remedies to control employer delinquencies to fringe benefit trusts (see note 5, *supra*). This Court should not permit the court of appeals' decision to eradicate the most innovative and effective bargaining mechanism for securing the integrity of fringe benefit contributions yet devised.[8] The court of appeals' errors

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[8]As noted by the court of appeals (App. A, *infra,* p. 9a, n. 9), contractual provisions similar to the agreement in this case have been used in the construction industry, at least in California, for a number of years. Although the decision of this Court in *Walsh v. Schlecht,* ..... U.S. ....., 97 S.Ct. 679 (1977), is useful, the clauses reviewed and approved in that case appear to be much less prevalent and much less critical to the economic integrity of the trusts and the bargaining unit than are the clauses in this case. The subcontractor in *Walsh* was *non-signatory* and, while his employees could encroach upon the work belonging to the prime contractor's bar-

are not fairly to be regarded as an initial encounter with a newly unfolding concern upon which other courts of appeals should express opinions before this Court acts to finally rationalize the proper view. The established law of secondary boycotts has been misconstrued in its first important application to the vital subject of security for fringe benefit trust contributions, and this Court should act promptly before significant damage[9] is done to such employee benefit plans.

2. The second question presented by this petition is an important question of federal law which has not been, but should be, settled by this Court: What time limit applies to a private party seeking to initiate court of appeals review of a final decision of the National Labor Relations Board? The courts of appeals of the Seventh Circuit[10] and the Ninth Circuit[11]

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gaining unit, his employees could not inflict the greater injury of obtaining benefits from the "common pool" trusts at the expense of the prime contractor's employees. Thus, while this Court in *Walsh* granted review to affirm enforcement of a prime contractor's obligation to fringe benefit trusts arising upon the subcontracting of unit work to a *non-signatory* subcontractor, the court of appeals in this case has invalidated a prime contractor's obligation to similar fringe benefit trusts arising upon subcontracting of unit work to a *signatory* employer. (See the court appeal's comment on *Walsh*, *infra*, at p. 127a.)

[9]The estimate of interested observers (n. 5, *supra*) that approximately 5% of fringe benefit contributions in the construction industry are delinquent, when applied to the 1973 monthly contributions of $5 million per month to the Trusts in this case, amounts to $250,000.00 per month in estimated delinquencies (without considering the 40% increase in monthly contributions since 1973). Considering that the severity of this problem is to be substantially worsened by the invalidation of the collective bargaining provisions in this case, and that the results will be extended to thousands of other fringe benefit trusts covering millions of additional employees, the Trustees and Local 12 respectfully urge that the issues in this case merit attention and review by this Court.

[10]*Kovach v. N.L.R.B.*, 229 F.2d 138 (7th Cir. 1956).

[11]App. A, *infra*, pp. 4a-5a, n. 3.

have held that no time limit except the doctrine of *laches* governs a private party in determining the time within which a petition for review of a Board decision must be filed in a court of appeals to be timely. The Board has unlimited time within which to seek judicial enforcement of its decision, so that enforcement proceedings can await efforts toward achieving voluntary compliance or a manifestation of a refusal to comply. *N.L.R.B. v. Pool Mfg. Co.*, 339 U.S. 577, 580-581, 70 S.Ct. 830, 832 (1950). This Court's only commentary regarding the time limits on a private party for seeking review of a Board decision occurred in *Pool Mfg. Co.* in which the Board had waited two and one-half years before seeking judicial enforcement of its order. Referring to the rights of the private party, this Court stated:

> "The employer, *who could have obtained review of the Board order when it was entered*, §10(f), is hardly in a position to object. National Labor Relations Board v. Todd Co., 2 Cir., 1949, 173 F.2d 705; National Labor Relations Board v. Andrew Jergens Co., 9 Cir., 1949, 175 F.2d 130, 134." (Emphasis added). 339 U.S. at 581.

This requirement that court review must be sought *promptly* is consistent with the important national labor policy favoring an early final resolution of labor disputes.[12] Nor is an open-ended, uncertain time constraint for seeking review of Board orders consistent

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[12]Congress mandated a 20-day limit on a private party for filing exceptions with the Board after issuance of the administrative law judge's recommended decision and order [29 U.S.C. § 160(c)], and no exceptions not urged before the Board may be raised in a reviewing court [29 U.S.C. § 160(e)].

with Congressional treatment of parties seeking court review of decisions in other types of controversies.[18]

The view that Congress placed no time constraint on private parties seeking review of Board orders not in accord with the enacted statutory scheme. The Seventh Circuit did not discuss 28 U.S.C. § 2107 in *Kovach, supra,* but stated that "it does not seem reasonable" that Congress would have placed no statutory time limitation upon the filing of a petition for review. 229 F.2d at 141. The court of appeals in this case ruled that the sixty-day limitation of 28 U.S.C. § 2107 was "specifically rejected" by the adoption of the Federal Rules of Appellate Procedure. However, 28 U.S.C. § 2072 provides that prior enacted statutes are superseded only by *conflicting* federal rules, and Rule 20 specifically provides that Rule 4 (which specifies time limits) is not applicable to petitions for review of agency orders. Thus, since Rule 4 is expressly inapplicable to the review of Board orders, the effect of 28 U.S.C. § 2107 on petitions for review of Board orders could not possibly be in conflict with, and superseded by, Rule 4. In fact, as the court of appeals noted, Rule 15(a) requires use of the time limit "prescribed by law", and no cogent reason is apparent for looking only to 29 U.S.C. § 160, and

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Such a strict, jurisdictional limitation upon the time for avoiding finality of the administrative law judge's decision *before* the Board makes its decision is wholly inconsistent with a view that Congress intended no particular time limit on the right to seek court review *after* issuance of the Board's order.

[18]See, for example, 28 U.S.C. § 2107; 28 U.S.C. § 2344; F.R.App.P., Rule 4.

not 28 U.S.C. § 2107 as well, to find the time limit prescribed by law.[14]

This procedural question arises in every case in which the Board issues a decision, and particularly in cases such as this in which the Board finds no unfair labor practice and dismisses the complaint. Under the *laches* doctrine adopted by the court of appeals, the rights of parties as determined by the Board are "chilled" for an indefinite term until those parties decide that, by acting to prejudice themselves, they may be successful in cutting off the right of opposing parties to seek court review of the Board's order. In this case, the Trustees relied upon the 60-day limit of Section 2107 and began giving full effect to the disputed clauses when no petition for review was filed within that time. The Trustees requested an opportunity to produce evidence of prejudice if the court of appeals intended to adopt the *laches* doctrine as governing (thereby hoping to avoid disclosure of the events causing prejudice unless necessary), but no opportunity to present the evidence was provided by the court of appeals. Considering that appellate courts are not well suited to evidentiary proceedings, this occurrence is not surprising, but lends emphasis to the lack of utility of *laches* as a tool for determining the timeliness of petitions for review of Board orders. This Court's first opportunity to establish the finality of Board decisions as to private parties should not be missed.

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[14]Application of 28 U.S.C. § 2107 to private parties would not endanger the flexibility of the Board in choosing the time to seek enforcement of its orders, since Section 2107 covers only proceedings for *review* of agency orders, *not* proceedings for enforcement of such orders.

3. The third question presented by this petition concerns the standing of trustees of fringe benefit trusts to participate as intervening parties in court of appeals proceedings which determine the validity of collective bargaining agreement provisions creating substantial rights in the trustees. The Trustees in this case participated as intervening parties in the Board proceedings, but were refused the status of intervening parties in the court of appeals and relegated to the status of *amicus curiae*. The Trustees have well-recognized rights to bring suit under Section 301(a) of the Act [29 U.S.C. § 185(a)] as real parties in interest to enforce provisions of collective bargaining agreements creating rights in them. *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 80 S.Ct. 489 (1960). Moreover, the Trustees would reasonably be considered "persons aggrieved" within the meaning of Section 10(f) of the Act [29 U.S.C. § 160(f)], and entitled to file a petition for review, if the Board had issued a decision to the same effect as the court of appeals' decision. Accordingly, this Court's views stated in *International Union, etc. Local 283 v. Scofield*, 382 U.S. 205, 86 S.Ct. 373 (1965) seem entirely pertinent to the Trustees in this case. The Trustees should have been permitted to participate as intervening parties and, having been denied that right improperly, the Trustees have standing to petition this Court for review. *Id.*, 382 U.S. at 209-222. Although the Trustees were neither charged parties nor charging parties in the Board proceedings, the impact of the court of appeals' decision on the rights of the Trustees in other pending and future judicial proceedings is undeniably substantial. The law governing the conduct of trustees of employee benefit plans calls upon such trustees to act single-mindedly

as independent fiduciaries to pursue the rights and interests of trust participants and beneficiaries. Under such circumstances, the decision of the court of appeals to place the Trustees on the sideline during these important proceedings deserves the review and guidance of this Court.

Conclusion.

The petition for a writ of certiorari should be granted.

June 1977.

Respectfully submitted,

WAYNE JETT,
Counsel for Trustees
Special Counsel for Local 12.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Griffith Company; J. W. Nicks Construction Co.; and Security Paving Co., Inc., *Petitioners,* vs. National Labor Relations Board, *Respondent.* No. 74-2740.

[November 4, 1976]

Petition to Review a Decision of the National Labor Relations Board.

Before: ELY and WALLACE, Circuit Judges, and RENFREW,* District Judge.

WALLACE, Circuit Judge:

This petition for review of a National Labor Relations Board (NLRB) decision presents a fairly novel and important issue of labor law: whether a provision in a collective bargaining contract prohibiting an employer from subcontracting work to any other signatory employer who is delinquent in required payments to common employee fringe benefit trusts violates federal labor law. The NLRB held that the agreement is valid and enforceable. We disagree and reverse and remand for further proceedings.

I. Factual Background

The three petitioners, Griffith Company, J. W. Nicks Construction Co. and Security Paving Co., Inc. (Griffith), are general construction contractors in southern

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*Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.

California. Each is a member of a construction industry trade association which, jointly with two similar associations, negotiated a Master Labor Agreement effective July 1, 1969, to July 1, 1974, with the International Union of Operating Engineers, Local Union Number 12 (Union). The agreement covers hours, wages and working conditions for employees represented by the Union in eleven southern California counties. A large number of other employers have individually negotiated "short form" agreements with the Union which incorporate by reference most of the terms and conditions of the Master Labor Agreement.

These agreements obligate the employers to make specified contributions to four employee fringe benefit trust funds created pursuant to 29 U.S.C. § 186(c)(5). These trusts collect approximately $5 million per month from over 2,500 employers for the benefit of 40,000 employees. Each trust pools the contributions from all employers into one account. An employee's eligibility for benefits is generally dependent on hours worked, but has nothing to do with whether his employer actually made contributions to the trusts. Thus, if an employer fails to make the required contributions, all beneficiaries suffer reduced benefit levels but no employees are completely cut off from benefits.

Over the years, delinquent employer contributions have been a significant problem. All four trust funds have experienced some financial difficulty and some have had to reduce benefits. The trusts have implemented a number of means to deal with delinquencies. One of these means is the subject of this case.

Once an offending employer is discovered and after informal settlement attempts have failed, the employer's

name is placed on a delinquency list which is circulated to signatory employers. Article I, Paragraph B-15 of the Master Labor Agreement (Paragraph 15) then provides that no employer shall subcontract any part of a job to any subcontractor on the delinquency list until such subcontractor has paid the delinquent amounts. Paragraph 16 provides that if an employer does subcontract to a delinquent subcontractor in violation of Paragraph 15, then the employer is liable for the delinquency. If a subcontractor becomes delinquent after commencing work, the employer is liable for the delinquency and must terminate the subcontract. If the employer does not pay the amounts due, the Union is given the right to withhold services.[1]

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[1]These parts of the contract read as follows:

15. The Trustees of the Trust Funds, through their Administrator, shall furnish each Contractors Association and the Union, with a list of delinquent Contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquent list until such Contractor has paid all delinquent monies to the various Trust Funds.

(a) Any disputes between the parties concerning the payment or nonpayment of monies due the Trust Funds are not subject to Article V of the Agreement.

16. In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums over to the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Contractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date of the delinquency list on which the Subcontractor's name first appeared. The Contractor shall terminate the contract of the Subcontractor who fails to properly correct his delinquency.

(a) Where the Contractor fails or refuses to make payments required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor.

In early 1973, the trustees learned that Urban Pacific Construction Co. (Urban Pacific), a contractor who had signed a short form agreement with the Union and who was on the delinquency list, was doing subcontract work for Griffith and others. The administrator of the trust funds notified these contractors that they were liable for the delinquencies under the Master Labor Agreement. The trust's attorney made at least four telephone calls informing Griffith that if the delinquencies were not paid, the administrator would notify the Union of its right to withhold services from Griffith. Two of the contractors paid part of the delinquency; Griffith and some of the others did not. Part of the delinquency remaining unpaid, the administrator notified the Union that it had the right to withhold services from Griffith and the others who had not paid.

Griffith and two other contractors filed complaints with the NLRB charging that Paragraphs 15 and 16 of the Master Labor Agreement constituted an agreement to cease doing business with another employer in violation of section 8(e) of the National Labor Relations Act (Act), *as amended,* 29 U.S.C. § 158 (e), and that certain threats to strike violated section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. § 158(b)(4)(ii)(B). The trustees of the fringe benefit trust funds were permitted to intervene. After a hearing, an administrative law judge dismissed the complaints in their entirety. The NLRB, with two members dissenting, affirmed.[2] Griffith petitioned this court for review.[3]

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[2]The NLRB's decision and order are published at 212 NLRB 343 (1974).

[3]The petition for review was filed 79 days after the NLRB's order. The Union and the trustees argue that the petition was not filed within the 60-day period prescribed by 28 U.S.C.

II. Contentions of the Parties

Section 8(b) of the Act provides generally that it is an unfair labor practice for a labor organization and an employer to enter into an agreement whereby the employer agrees "to cease doing business with any other person." 29 U.S.C. § 158(e).[4] Section 8(b)(4)(ii)(B) of the Act provides that it is an unfair labor practice for a labor organization "to threaten, coerce or restrain any person" where an object is to

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§ 2107 for civil appeals where an agency of the United States is a party. But statutes are superseded by conflicting federal rules. 28 U.S.C. § 2072. Rule 4, Fed. R. App. P., contains provisions parallel to 28 U.S.C. § 2107, and Rule 20, Fed. R. App. P., provides that Rule 4 is not applicable to petitions for review of agency orders. Thus the 60-day limitation was specifically rejected. Rule 15(a), Fed. R. App. P., provides instead that a petition for review must be filed "within the time prescribed by law." Section 10 of National Labor Relations Act, 29 U.S.C. § 160, does not specify such a time. Therefore, the Seventh Circuit has held that the doctrine of laches applies. The party challenging the timeliness of a petition must show that more time has elapsed than reasonably necessary and that it was prejudiced by the delay. Kovach v. NLRB, 229 F.2d 138, 141 (7th Cir. 1956). We adopt this standard and find that Griffith's petition was timely.

[4]Section 8(e) provides in part:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer . . . agrees . . . to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . .

29 U.S.C. § 158(e).

force any person "to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B).[5]

Griffith contends that Paragraphs 15 and 16 of the Master Labor Agreement violate section 8(e) by requiring Griffith to cease doing business with delinquent subcontractors. It also charges that the action of the trusts' administrator in notifying the Union of its right to withhold services and the acts of the trusts' attorney's informing Griffith that the administrator would take such action violated section 8(b)(4)(ii)(B) as threats with the object of forcing Griffith to cease doing business with delinquent subcontractors.

The administrative law judge and the NLRB both conceded that the challenged contractual provisions and the administrator's efforts to enforce them contemplated that signatory contractors such as Griffith would cease doing business with delinquent subcontractors such as Urban Pacific. They argued, however, that the statutes invoked prohibit not all agreements and threats with

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[5]Section 8(b)(4) of the NLRA provides in part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . . .
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike . . .; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> . . . .
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . .: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
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> . . . .

29 U.S.C. § 158(b)(4).

a cease doing business thrust but only so-called "secondary" activity. Because the activity in this case was found to be lawful "primary" activity and not secondary, Griffith's complaint was dismissed. The administrative law judge found, and the Union and the trustees contend, that the activity here came within the well-established "union standards" exception to section 8(e) and (b). The NLRB implicitly rejected this position but agreed with the administrative law judge's alternative ground that the activity came within a new exception sanctioned by broad language in *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967). Therefore, the NLRB did not reach two other issues: whether section 8(e) should apply at all because of the provision excluding certain aspects of the construction industry[6] and whether the trust funds' administrator and the trust funds' attorney were agents of the Union for whose actions the Union is accountable pursuant to section 8(b)(4).

Responding to the conclusions of the NLRB, Griffith contends that the activity here was secondary, that the fringe benefit provisions in the contract are not permissible union standards clauses and that any new exception to section 8(e) for such clauses is not consistent with *National Woodwork*.

III. Primary-Secondary Distinction

Section 8(b)(4) was added to the Act by the Labor-Management Relations Act of 1947, ch. 120, Tit. 1, § 101, 61 Stat. 141-42. The statute has been difficult to interpret because its language seems to reach traditionally accepted labor practices. For example, traditional picketing of struck primary employers seeks,

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[6]See note 4 *supra*.

as one object, to encourage individual employees of neutral employers not to cross the picket lines. Yet this activity seems to come within the statutory proscription of inducement to cease doing business with others. The Supreme Court held in *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672-73 (1951), that the Act could not be read to diminish the traditional right to strike unless the diminution is specifically set forth and that no such specific provision in section 8(b)(4) reached such primary activity. Over the years the problem of secondary effects of primary activity received considerable attention from the courts and the NLRB. *See* ABA, The Developing Labor Law 617-40 (C. Morris ed. 1971).

In 1959 the Landrum-Griffin Act added a proviso to section 8(b)(4) making explicit Congress' intent not to prohibit otherwise lawful primary strikes and picketing,[7] Act of Sept. 14, 1959, Pub. L. No. 86-257, Tit. VII, § 704(a), 73 Stat. 542, and added section 8(e). *Id.* § 704(b), 73 Stat. 543.[8] Although the language of section 8(e) is as broad as that of section 8(b)(4) before the addition of the proviso, the courts and the NLRB have held that it also prohibits only agreements with a secondary aim. *National Woodwork Manufacturers Association v. NLRB, supra; NLRB v. Joint Council of Teamsters No. 38,* 338 F.2d 23, 28 (9th Cir. 1964); *Service Local 399,* 148 NLRB 1033 (1964).

Comprehensive general principles for distinguishing primary from secondary agreements are difficult to formulate. The courts have developed some fairly settled

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[7]See note 4 *supra.*

[8]See note 4 *supra.*

rules concerning the validity under section 8(e) of a number of specific types of contractual provisions. For example, "work preservation" as well as "union standards" clauses are generally held valid while "work acquisition" and "union signatory" clauses are not. *See* Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp,* 19 Kan. L. Rev. 651, 683-92 (1971). But no such rules dealing with the provisions challenged here have been formulated.[9] The Union, trustees, administrative law judge and the NLRB each attempt to justify the clauses either by bringing them within specific rules developed for "union standards" clauses or by creating a new exception for "fringe benefit protection" clauses under general principles distinguishing primary from secondary activity.

A. The *National Woodwork* Case

The leading case concerning the distinction between primary and secondary activity for purposes of sections 8(e) and 8(b)(4) is *National Woodwork Manufactur-*

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[9]It appears that contractual provisions very similar to the ones involved here have been used in the southern California construction industry for some time. Such provisions have been involved in a number of cases before the NLRB. General Teamsters Local 982, 181 NLRB 515, 520 & n.22 (1970), *aff'd sub nom.* Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322 (D.C. Cir. 1971); Southern California Dist. Council of Hod Carriers Local 345, 158 NLRB 303, 308-10 (1966); Orange Belt Dist. Council of Painters No. 48, 153 NLRB 1196, 1197 (1965), *aff'd,* 365 F.2d 540 (D.C. Cir. 1966); Los Angeles Bldg. & Constr. Trades Council, 150 NLRB 1590, 1597 (1965); Cement Masons Local 97, 149 NLRB 1127, 1130 n.4 (1964); Los Angeles Bldg. & Constr. Trades Council, 145 NLRB 279, 281 (1963). None of these decisions, however, determined the validity of these clauses in a factual context similar to this case. In General Teamsters Local 982, *supra,* the NLRB noted that the clauses are not clearly unlawful on their face and, in the absence of evidence concerning the terms of the trust contributions and expenditures, dismissed that part of the complaint. 181 NLRB at 520, 524.

ers Association v. NLRB, supra, 386 U.S. 612. There, Frouge, a general contractor working on a housing project in Philadelphia, was subject to a collective bargaining agreement between a local carpenters' union and a general contractors' association in which it was agreed that union members would not handle premachined doors. When Frouge ordered premachined doors for the project, the union ordered its members not to hang them. Frouge then substituted "blank" doors which the carpenters fitted and cut at the jobsite. The National Woodwork Manufacturers Association, whose members make premachined doors, filed charges against the union with the NLRB. It claimed that the union violated sections 8(e) and 8(b)(4)(ii)(B) of the Act by including the "will not handle" provision in the collective bargaining agreement and enforcing it. The union's defense was that the object of the "will not handle" clause was preservation of the carpenters' on-site work of fitting and cutting blank doors and that this is a primary object not forbidden by those sections. *Id.* at 616-18.

The NLRB found no violation of either section but the court of appeals disagreed. The court noted that section 8(e) was inserted in the Act at the same time as the proviso that section 8(b)(4) would not apply to primary strikes or picketing. Finding no similar restriction in 8(e), it concluded that there was a violation of section 8(e) regardless whether the union conduct was primary or secondary. *Id.*

The Supreme Court began its analysis with an exhaustive review of the legislative history. The Court concluded that section 8(e) as well as section 8(b)(4) was not meant to prohibit primary activity. Both sec-

tions were directed only at secondary boycotts whose "core concept" is "union pressure directed at a neutral employer the object of which [is] to induce or coerce him to cease doing business with an employer with whom the union [is] engaged in a labor dispute." 386 U.S. at 622 (footnote omitted).

The Court noted the importance of technological change to labor-management relations and reasoned that any effort by Congress to curtail voluntary negotiations of solutions to these problems would be accompanied by extensive study and debate. *Id.* at 640-42. The Court also stated that the provisions of the Act guaranteeing labor the rights to bargain collectively and to strike except as specifically provided in the Act, 29 U.S.C. §§ 157, 163, "caution against reading statutory prohibitions as embracing employee activities to pressure their own employers into improving the employees' wages, hours, and working conditions." *Id.* at 643.

In *National Woodwork* the determination whether a particular agreement and its enforcement violated sections 8(e) and 8(b)(4) required "an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere." *Id.* at 644 (footnote omitted). In making this inquiry, the Court focused on two factors: (1) "the tactical object of the agreement and its maintenance," *i.e.*, whether the union means to influence the labor relations of the signatory ("boycotting") employer or to interfere with the labor relations of others (the "boycotted" employers); and (2) the allocation of the benefits of the agreement, *i.e.*, whether they

accrue mainly to the boycotting employees or other employees of the primary employer on the one hand, or, on the other, to members of the union generally. *Id.* at 645. The Court concluded: "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees."[10] *Id.* (footnote omitted).

The Court had no trouble concluding that the "will not handle" provision at issue in *National Woodwork* and its enforcement were lawful primary activity. The finding of the trial examiner, adopted by the NLRB, was that the purpose of the clause was preservation of work traditionally performed by jobsite carpenters, a primary motive. This finding was supported by substantial evidence. *Id.* at 645-46.

B. Application of *National Woodwork*

The administrative law judge found that the fringe benefit clauses at issue here were "clearly designed" to allow the trust fund's administrator and prime contractors to "pressure" delinquent subcontractors to remedy their delinquencies and to protect trust fund benefits by making other responsible parties liable for all de-

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[10]The Union and trustees place too much emphasis on the general conclusory language, ignoring the two more specific factors considered by the Court. The parties also relied heavily on language from circuit court opinions stressing whichever of the two specific factors seemed to weigh most heavily in their favor. *See, e.g.*, Orange Belt Dist. Council of Painters No. 48 v. NLRB, 328 F.2d 534, 538 (D.C. Cir. 1964) (clause is primary if it directly benefits covered employees); NLRB v. Joint Council of Teamsters No. 38, *supra*, 338 F.2d at 28 (clause is secondary if directed at third-party employers). These cases and the others cited are consistent with the results from an analysis of the two factors considered by the Court in *National Woodwork*. For a summary of how the lower courts weigh these two factors, see Note, *A Rational Approach to Secondary Boycotts and Work Preservation*, 57 Va. L. Rev. 1280, 1297-1300 (1971).

linquencies. The NLRB did not expressly adopt or reject these findings. It conceded that the clauses contemplate that signatory contractors would cease doing business with delinquent subcontractors but justified the clauses as helpful in protecting the fringe benefits of all employees of all signatory employers. Implicit in the NLRB's decision is a finding that the object of the clauses is to reduce delinquencies and thereby to improve fringe benefits for the trust funds' beneficiaries by requiring other employers to boycott delinquent subcontractors.

We conclude that these are secondary motives. Our course is clear when we apply the two keystone factors of *National Woodwork*. Examining first the tactical object of the boycott, it is obvious that the Union is not attempting to influence the labor relations policy of Griffith, the boycotting employer, but is instead trying to interfere with the labor relations policy of the boycotted employer, Urban Pacific. It is Urban Pacific with which the Union has a dispute over alleged delinquencies in trust fund contributions. Griffith's only offense lies in doing business with Urban Pacific.

The NLRB ignored this interference with Urban Pacific's labor relations and focused solely on the second *National Woodwork* consideration: the allocation of benefits of the boycott. In fact, the NLRB viewed the "critical question" as whether the agreement "was substantially in the interest and for the protection of the employees of [all contracting] employers." The NLRB then reasoned that since delinquencies cause all such employees to suffer reduced fringe benefits, the clauses which are designed to combat the delinquencies meet this test.

But this reasoning allows the Union to cast its protective net too widely. As the NLRB recognized, primary activity must confer benefits on the members of a relevant "work unit" and not on some larger group such as members of the Union generally. But the NLRB adopted the administrative law judge's conclusion that the relevant work unit here is equivalent to the respective bargaining unit. But even if we adopted the bargaining unit measure, which we specifically do not,[11] we could not agree with the NLRB that the

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[11]The administrative law judge considered this issue at some length. The parties offered various proposals ranging from work units limited to the employees of one employer to one industry-wide work unit. The administrative law judge held, however, that prior NLRB decisions dictated that the relevant work unit be equivalent to the corresponding bargaining unit. *See* Raymond O. Lewis, 148 NLRB 249, 253-54 (1964), *remanded sub nom.* Lewis v. NLRB, 350 F.2d 801 (D.C. Cir. 1965), *on reconsideration sub nom.* W.A. Boyle, 179 NLRB 479 (1969), *petition for review dismissed as moot sub nom.* UMW v. NLRB, 468 F.2d 1139 (D.C. Cir. 1972); *but see* Note, *A Rational Approach, supra* note 10, 57 Va. L. Rev. at 1291-97. The NLRB accepted this ruling and it has not been challenged on review.

The administrative law judge may have misused the work unit concept. Work units have in the past been defined solely for use in considering the allocation of benefits of a challenged labor practice: in order for the practice to be considered primary, it must benefit mainly employees in the work unit (although not necessarily employees of the employer against whom the action is taken). *See id.* at 1290-94. However, the administrative law judge seemed to apply the concept in considering the tactical object of the Union's action. He apparently assumed that if two employers contract with the same bargaining unit, the Union may coerce one into ceasing to do business with the other where the object is interference with the labor relations of the other regardless of the allocation of benefits. On the basis of this assumption, he thought it would be anomalous to rule the boycott of Urban Pacific illegal since the Union would still be allowed to coerce Griffith into boycotting delinquent contractors in Griffith's bargaining unit. The propriety of the administrative law judge's assumption is not before us and we express no opinion on it. We note only that there is no precedent for this surprising assumption and that we consider it an open issue.

activity here is primary. The NLRB erred in omitting consideration of the employees who are beneficiaries of the trust fund but are not members of the same bargaining unit which negotiated with Griffith. There are a handful of large multi-employer union bargaining units (which negotiated the Master Labor Agreement with the large contractors associations) and a large number of single-employer union bargaining units (which negotiated short form agreements with individual contractors). Thus the critical question is not whether the agreement was substantially for the benefit of the employees of all contracting employers, as the NLRB phrased it, but whether the agreement was substantially for the benefit of the employees in Griffith's employees' work unit as opposed to the members of the Union generally.

This question must be answered in the negative. Employees of many work units are beneficiaries of the trust funds and the burdens of delinquencies in trust fund contributions are shared equally by all. By withholding services from contractors doing business with delinquent subcontractors with the object of eliminating those delinquencies, the Union seeks to benefit not only the contractors' work unit, but all its members who may become eligible to receive funds from the trusts. The NLRB did point out that the clauses challenged here may not benefit Union members generally because unemployed Union members who do not qualify for fringe benefits may not have an interest in seeing that delinquencies are remedied. But we do not think that this is an important factor. What is critical is that the benefits sought to be achieved by the clauses extend far beyond the relevant work unit and that

the benefits conferred on the work unit are no more "direct"[12] or substantial than those conferred on the other units.[13] Thus we conclude that the agreements and their enforcement constitute unlawful secondary activity.

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[12]We reject the NLRB's argument that the "directness" of the effect on the work unit employees is decisive. The NLRB argues that the effect of Urban Pacific's delinquency on Griffith's employees' fringe benefits is more direct than the effect of subcontracting unit work in violation of union standards or work preservation clauses which have been held primary. But we do not read *National Woodwork* as requiring any mataphysical inquiry into the relative degrees of directness of causation. Some commentators have distinguished between direct and indirect benefits to unit employees in distinguishing primary from secondary activity, *see, e.g.*, Note, *A Rational Approach, supra* note 10, 57 Va. L. Rev. at 1298; Aaron, *The Labor-Management Reporting and Disclosure Act of 1959,* 73 Harv. L. Rev. 1086, 1119 (1960), but they use the terms differently from the NLRB. An effect is "direct" if the bargaining unit is benefited in some special way and "indirect" if the bargaining unit is benefited only because of some general benefit conferred upon the union. Under this scheme, the effects on Griffith's employees of Urban Pacific's delinquencies are, if anything, less direct than in the work preservation and union standards cases because the effect on them is no different from the effect on all other employees who are beneficiaries of the trusts.

[13]The administrative law judge found, and the Union and the trustees argue on review, that the agreement here comes within the well-established exception to section 8(e) for union standards clauses. The NLRB was correct in not relying on this ground.

A typical union standards clause prohibits subcontracting of unit work to any employer whose employees' wages, hours and working conditions are less favorable than those enjoyed by the union. Such clauses are generally held primary because they are usually designed to protect the wages and conditions achieved by the union in bargaining and to preserve unit work by removing the incentive for the employer to subcontract unit work to "sub-standard" contractors in order to avoid paying union terms. *See, e.g.*, Teamsters Local 413 v. NLRB, 334 F.2d 539, 548 (D.C. Cir.), *cert. denied,* 379 U.S. 916 (1964); *see generally* Goetz, *Secondary Boycotts, supra,* 19 Kan. L. Rev. at 690-92; ABA, Labor Law, *supra,* 658-64.

The administrative law judge concluded that Paragraphs 15 and 16 of the Master Labor Agreement "realistically do function

The NLRB stressed, however, the desirability of fringe benefit programs. Borrowing some language from *National Woodwork*, see 386 U.S. at 642, the NLRB concluded that it "should not lightly impute to Congress in Section 8(e) an intent to hinder or impede such necessary and commendable efforts to guarantee employees these ancillary benefits." But the reasoning

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as union standards clauses." He noted that an employer who does not intend to make required trust fund contributions can bid lower for subcontracts than one who intends to make the payments. By making prime contractors liable for their subcontractors' delinquencies, he reasoned that the Master Labor Agreement cancels the delinquent employer's bidding advantage and removes the economic incentive to contract with such employers. Thus he held that the clauses preserve the work of the employees of the prime contractors and non-delinquent subcontractors and protect the fringe benefits of all.

It is clear to us, however, that these are not primary union standards clauses. First, a primary clause seeks to protect only work traditionally performed by the unit. Here there is no contention that the work subcontracted to Urban Pacific was ordinarily accomplished by Griffith's employees and the administrative law judge did not so find. He found that the Union's motive was to protect the work not only of Griffith's employees' work unit, but of the employees of all non-delinquent employers, generally a secondary objective.

Moreover, we doubt that the record supports the administrative law judge's conclusion that the Union seeks to preserve work for employees of non-delinquent employers at the expense of employees of delinquent contractors. The latter are Union members too and the Union should be as desirous of protecting their work as the work of the employees of non-delinquents. Indeed, the Union's policy of protecting the fringe benefit eligibility of the delinquent contractors' employees is inconsistent with the desire found by the administrative law judge not to protect those same employees' jobs.

For similar reasons, we do not find much assistance in decisions involving the much-litigated "80-cent clause" of the 1964 amendment to the National Bituminous Coal Wage Agreement of 1950. That clause required employers to contribute to fringe benefit trusts 40 cents per ton of coal produced and 80 cents per ton of coal acquired from non-union producers. The NLRB upheld the provision as a primary union stand-

(This footnote is continued on next page)

of *National Woodwork* does not support this conclusion. We do not read it as construing section 8(e) to prohibit only secondary activity for undesirable or reprehensible ends. Congress has over the years struck a delicate balance of power between labor and management. Unions may engage in concerted coercive activities against primary employers only; secondary pressures are forbidden even where a union has the commendable objective of improving the wages and working conditions of union members generally.

Nor do we understand how the clauses challenged here are "necessary" to guarantee the employees maximum fringe benefits. The Union argues that many delinquent employers are "fly-by-night" enterprises which do business out of post office boxes and often change their names and locations to avoid suits to enforce their contractual obligations. The Union notes

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ards clause since it found that the 80-cent surcharge was roughly equivalent to the differential between union and non-union wages and that the union's object was to remove the incentive for substituting coal purchased from non-union mines for coal previously mined by the union. United Mine Workers, 188 NLRB 753, 754 (1971), *petition for review dismissed for lack of jurisdiction,* 468 F.2d 1139 (D.C. Cir. 1972). The Sixth Circuit disagreed. It concluded that there could be no work preservation motive since the employer could comply with the clause by firing all its employees and buying all its coal from other signatory mines. It thought instead that the union sought by the clause to induce non-union mines to become unionized, a secondary motive. Riverton Coal Co. v. UMW, 453 F.2d 1035, 1040-41 (6th Cir.), *cert. denied,* 407 U.S. 915 (1972).

Each party relies heavily on whichever of these cases supports its respective position, but even if we were to accept the view of the NLRB, which we specifically do not decide, it would make no difference here because the 80-cent clause is distinguishable. Because the 80-cent penalty was imposed on coal produced from non-union suppliers, it is at least arguable that the union's motive is protection of unit work. But here the Union's object is not protection of unit work, but remedying the default of a third-party contractor. This is a secondary object.

that when the Urban Pacific delinquency was first discovered, Urban Pacific could not be found. It is indeed difficult to bring *any* pressure, primary or secondary, on an elusive delinquent employer, but once Urban Pacific was discovered working on Griffith's construction site, primary and secondary pressures both became possible and there is no reason why secondary pressures were necessary. The Union had the right to withhold its services from Urban Pacific, although it did not exercise that right here, and such a primary strike should be as effective in inducing Urban Pacific to cure its delinquency as the secondary pressures threatened in this case. Alternatively, the Union could have brought suit for the delinquency once Urban Pacific was located. Finally, the Union could avoid dealing with the "fly-by-night" subcontractors altogether. At the very least, the Union could ask them to disclose their business address and telephone number and the names and addresses of their principal officers, to designate a reliable agent for the service of process, or to post a security bond for fringe benefit contributions before agreeing to supply union labor.[14]

In short, we see no reason for creating a new exception to section 8(e) for secondary fringe benefit trust contribution enforcement clauses beyond the narrow exception created by a bare majority of the Supreme Court for primary work preservation clauses in *National Woodwork*.

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[14]A performance bond is a permissive bargaining subject. The union can therefore ask employers to post a bond which will be legally enforceable. Bonding is not a mandatory subject, however, and the union cannot insist on a bond to the point of an impasse in the negotiations and cannot strike over the issue. NLRB v. Hod Carriers Local 1082, 384 F.2d 55 (9th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

IV. Remaining Issues

Since the NLRB concluded that the clauses and their enforcement were lawful primary activity, it did not reach a number of other issues raised by the parties. The Union and the trustees argued that even if the clauses are secondary, they are valid under the construction industry exception to section 8(e).[15] Because clauses within the proviso may be enforced only by judicial means and not by economic coercion, *NLRB v. IBEW Local 769*, 405 F.2d 159, 163 (9th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969), this is a defense only to the charge of violating section 8(e) and not 8(b)(4). Griffith responds that the proviso sanctions only clauses which require subcontractors to be parties to contracts with the Union and not those which require that they be in compliance with such contracts. Griffith also notes that a clause otherwise within the proviso is invalid if it provides for union self-help in enforcement. *Id.* at 163-64. As the NLRB should have the opportunity to consider these issues first on remand, we do not reach them at this time.

With respect to the section 8(b)(4) charge, the Union and the trustees argue that the only threats alleged were made by the trust funds' administrator and attorney who are not the Union's agents. They note that the trust funds are administered by trustees drawn equally from labor and management pursuant to 29 U.S.C. § 186(c)(5) and that employees of the trustees are held to the same fiduciary duties to the beneficiaries of the trusts as the trustees. Thus they urge that the trustees and their employees are

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[15]See note 5 *supra*.

not agents of the Union. The NLRB will have to consider this issue on remand.

The NLRB's decision that the agreements and their enforcement are lawful primary activity is reversed and the case is remanded to the NLRB for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B.

Decision and Order.

United States of America, Before the National Labor Relations Board.

International Union of Operating Engineers, Local Union No. 12 and Griffith Company; J. W. Nicks Construction Co.; Security Paving Co., Inc.; and Sukut-Coulson, Inc.; and V. & L Construction Co., Inc. Case 21—CC—1451.

International Union of Operating Engineers, Local Union No. 12 and Griffith Company; J. W. Nicks Construction Co.; Security Paving Co., Inc.; and Sukut-Coulson, Inc. and Associated General Contractors of California, Inc.; Building Industry Association of California, Inc.; and Engineering and Grading Contractors Association, Inc. Parties to the Contract. Case 21—CE—126.

On September 17, 1973, Administrative Law Judge Maurice M. Miller issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Parties filed exceptions and supporting briefs, the Respondent Union and the Intervenors filed answering briefs, and the Intervenors filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order with the following modifications and additions.

In this case the General Counsel has alleged that the Respondent Union violated Sections 8(e) and 8(b)

(4)(ii)(B) of the Act by entering into, maintaining, and enforcing certain provisions in its Master Labor Agreement, more specifically set forth in the attached Administrative Law Judge's Decision, whereby the contracting employers agree not to subcontract work to any subcontractor whose name appears on a monthly list of employers delinquent in their payments to the several fringe benefit trust funds jointly maintained and administered by the Union and the signatory Employers.

The General Counsel contends that Union Pacific, the delinquent subcontractor, is the only employer with which the Union has a legitimate, primary labor dispute and the Charging Parties, who are not themselves in default in their payments to the trust funds, are neutral, secondary employers entitled to the protection of the statute. In support of this contention the General Counsel points out that these employers are required under the challenged contract to pay not only the delinquency incurred by Union Pacific on their jobs, but all preexisting amounts owed the trust funds from previous jobs with other contractors.

It may be conceded on this record that the above contractual provisions and the trust fund administrator's efforts to enforce them with respect to Union Pacific contemplate that contractors, signatory to the Union's Master Labor Agreement, would cease doing business with that delinquent subcontractor. While it is clear that Union Pacific is a primary employer, subject to the thrust of the Union's contractual and economic force, it does not follow that contractors doing business with Union Pacific are, as the General Counsel asserts,

neutral employers uninvolved in the Union's dispute over delinquent payments to its trust funds.

The critical question to be determined in this case is not the degree or nature of the Union's restraint against the Charging Parties or Union Pacific's status as a primary employer, but whether in the circumstances of this case it can fairly be held that the agreement subscribed to by all contracting employers was substantially in the interest and for the protection of the employees of those employers. Accepting, as we do, the Administrative Law Judge's conclusion that the record will not support a finding of a single, industrywide bargaining unit,[1] the answer to this question must be in relation to multiple units of employees whose employers have bound themselves to a voluntary union-employer procedure for the collection of delinquent payments to the trust funds. We agree with the Administrative Law Judge that this question should be answered in the affirmative.

It is by now well established that every bargaining contract with a "cease doing business" objective, although literally within the proscription of Section 8(e) of the Act, is not necessarily unlawful. The Board and the courts have held that a union may lawfully require a contracting employer to cease or refrain from doing business with another employer if the union's

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[1]In this respect we do not adopt the Administrative Law Judge's comments and appraisal of the Decision of the Administrative Law Judge in *Joint Council of Teamsters No. 42, IBT (Merle Riphagen)*, 212 NLRB No. 5 (1974).

objective properly falls within certain carefully delineated exceptions, such as "work preservation"[2] and maintenance of "union standards."[3] Such cases, unlike the instant case, have generally involved attempts to

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[2]*National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967); *Orange Belt District Council of Painters No. 48, AFL-CIO v. N.L.R.B.*, 328 F.2d 534 (C.A.D.C., 1964). Contrary to our dissenting colleagues, the Supreme Court has held that the issue of voluntarism with respect to a proper interpretation of Sec. 8(e) is relevant and material. In *National Woodwork, supra,* the Court specifically pointed out that the legislative history of Sec. 8(e) was silent with respect to a congressional purpose of "curtailing the ability of labor and management *voluntarily* to negotiate for solutions" to the problems of automation and onrushing technology. (Emphasis supplied.) In the absence of this history the Court concluded that Sec. 8(e) did not prohibit voluntary agreements directed to work preservation. This is the clear and explicit language of the Supreme Court, which has not been altered by Congress.

To suggest, as our dissenting colleagues do, that there is a material distinction between voluntary work preservation agreements and voluntary secondary boycott agreements, so far as the effect on the secondary employer is concerned, reduces the argument to a question of semantics. Clearly, in both situations enforcement of the agreement results in a cessation of business between two employers, one of whom may be considered secondary. The Supreme Court went to great lengths in the *National Woodwork* case to point out that the legality of such an agreement cannot and does not depend upon the literal language of Sec. 8(e). In that case the Court upheld the legality of a voluntary agreement requiring an employer, at the insistence of a union representing carpenters, to cease doing business with neutral suppliers of prefabricated doors. The Court was gravely concerned with the impact of automation on the ability of union craftsmen to earn a living at the traditional craft and largely for that reson held that Sec. 8(e) should not be interpreted to prohibit such voluntary agreements between a union and a contracting employer. We believe the same reasoning should apply in the instant case, particularly where, as here, all employers affected have signed the same restrictive agreement relating directly to the pension and welfare benefits of their own employees as well as the employees of others.

[3]*International Union, United Mine Workers of America (Dixie Mining Company)*, 188 NLRB 753 (1971); *Meat and Highway Drivers, Dockmen, Helpers and Miscellaneous Truck*

(This footnote is continued on next page)

prevent a contracting employer from doing business with a nonunion subcontractor. The difference here is that all involved employers are signatory to the Union's contract and have agreed not to do business with each other if one of them is delinquent. While the context is unusual, it should not diminish our examination of the Union's objective with respect to each unit of employees whose employer has been required to cease doing business with a delinquent subcontractor.

In concluding that the General Counsel has not established a violation of the statute in this case the Board has been cognizant of the great strides made by unions and employers in the area of fringe benefits for employees, such as the health and welfare, pension, vacation, and apprenticeship programs in this case. As the Supreme Court noted in *National Woodwork Manufacturers Association v. N.L.R.B., supra,* with respect to the efforts of unions and employers to treat the problems of technology and automation, the Board should not lightly impute to Congress in Section 8(e) an intent to hinder or impede such necessary and commendable efforts to guarantee employees these ancillary benefits. We need not and do not pass on the validity of restrictive agreements in industries other than the construction industry or in circumstances different from those in this case. Here at least it is clear that a substantial number of the Union's members work from job to job and from contractor to contractor with no certainty that they will remain employed in any particular unit for any period of time. Without

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Terminal Employees, Local Union No. 710, Teamsters [Wilson & Co.] v. N.L.R.B., 335 F.2d 709 (C.A.D.C. 1964); *Truck Drivers Union Local No. 413, Teamsters [Brown Transport Corporation] v. N.L.R.B.*, 334 F.2d 539 (C.A.D.C., 1964).

a trust fund arrangement encompassing the interests of employees of all employers involved, no unit of employees can be assured that funds will be available for medical emergencies or for retirement. Surely, this is not a case where the Union has sought to protect the interests of union members generally, whether or not employed by a contracting employer. This agreement and its maintenance is addressed solely to the labor relations of the contracting employers vis-a-vis their own employees. As such, it satisfies the touchstone of legality set forth by the Supreme Court in *National Woodwork, supra.* It may be argued that the delinquency of a single subcontractor, such as Union Pacific, is not such an impediment to the existence or solvency of the trust funds to warrant the drastic procedure of a restrictive covenant operating against all other contractors. But the way is not open to disregard the delinquency of one subcontractor without disregarding the delinquencies of all others. Totaled together, the impact of many delinquent subcontractors doing business with impunity in this industry would be destructive of the entire trust fund plan. The administrator for the trust funds testified that inability to collect funds for the health and welfare fund at one time sharply affected the solvent status of that fund. The trustees were required to borrow $2 million, change carriers, cut medical benefits, and reduce costs in every possible manner. Thereafter, benefits available under this plan were improved as a result of stepped-up collection procedures, including enforcement of the restrictive covenants against delinquent contractors.

On the basis of the foregoing we conclude that the agreement of the Charging Parties not to do business with delinquent subcontractors and the trust fund ad-

ministrator's invocation of that agreement with respect to Union Pacific was primary conduct, relating directly and immediately to the interests and conditions of employment of the employees in each unit of contracting employers involved in this case. We shall therefore dismiss this complaint in its entirety.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C., June 28, 1974.

John H. Fanning,
Member

Howard Jenkins, Jr.,
Member

John A. Penello,
Member

NATIONAL LABOR RELATIONS
BOARD

[Seal]

CHAIRMAN MILLER AND MEMBER KENNEDY, dissenting:

For the reasons set forth in our dissent in *Joint Council of Teamsters No. 42, et al. (Merle Riphagen)*,

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[4]Member Jenkins concurs in dismissing the complaint herein for the reasons stated by him in *Joint Council of Teamsters No. 42, International Brotherhood of Teamsters (Merle Riphagen)*, 212 NLRB No. 5.

212 NLRB No. 5 issued today, we dissent from our colleagues' dismissal of the 8(b)(4)(ii)(B) and 8(e) complaint herein, and would find the alleged violations of the Act.

Dated, Washington, D.C., June 28, 1974

Edward B. Miller,
Chairman

Ralph E. Kennedy,
Member

NATIONAL LABOR RELATIONS
BOARD

APPENDIX C.

Decision.

United States of America, Before the National Labor Relations Board, Division of Judges, Branch Office, San Francisco, California.

International Union of Operating Engineers, Local Union No. 12 and Griffith Company; J. W. Nicks Construction Co.; Security Paving Co., Inc.; Sukut-Coulson, Inc.; and V & L Construction Co., Inc. Case No. 21-CC-1451.

International Union of Operating Engineers, Local Union No. 12, Respondent Union and Griffith Company; J. W. Nicks Construction Co.; Security Paving Co., Inc.; and Sukut-Coulson, Inc. Charging Parties and Associated General Contractors of California, Inc.; Building Industry Association of California, Inc.; and Engineering and Grading Contractors Association, Inc. Parties to the Contract. Case No. 21-CE-126.

Messrs. Burton Litvack and *Frank M. Wagner, Jr.*, of Los Angeles, Calif. for the General Counsel.

Rose, Klein and Marias, by *Robert M. Simpson,* of Los Angeles, Calif., for Respondent Union.

Mr. Wayne Jett, of Los Angeles, Calif., for Intervenors.

DECISION

Statement of the Case

MAURICE M. MILLER, Administrative Law Judge: Upon charges and amended charges filed and duly served, the General Counsel of the National Labor Relations Board has issued a Consolidated Complaint and Notice of Hearing against International Union of Operating Engineers, Local Union No. 12, designated

as Respondent Union herein, under Section 10(b) of the National Labor Relations Act, as amended.

(Griffith Company, designated as Griffith hereinafter, J. W. Nicks Construction Co., Security Paving Co., Inc., Sukut-Coulson, Inc., and V & L Construction Co., Inc., all collectively designated as Five Contractors hereinafter, had filed their initial "CC" and "CE" charges on March 8, 1973. Thereafter, amended charges in Case No. 21-CE-126 had been filed on April 26th and May 4th respectively. General Counsel's Consolidated Complaint and Notice of Hearing issued May 7, 1973; copies thereof were, subsequently, duly served.)

Within General Counsel's Consolidated Complaint, Respondent Union has been charged with unfair labor practices affecting commerce under Section 8(b)(4)(ii)(B), Section 8(e), and Section 2(6) and (7) of the statute. 61 Stat. 136, 73 Stat. 519. Respondent Union's answer, duly filed, concedes certain factual matters set forth within General Counsel's Consolidated Complaint; Respondent Union has, however, denied the commission of unfair labor practices.

Pursuant to notice, a hearing with respect to the issues was held at Los Angeles, California, on June 21 and 22, 1973, before me. The General Counsel and Respondent Union were represented by counsel.

(When the hearing convened, counsel representing twenty-one trustees of the Operating Engineers Health and Welfare, Pension, Vacation-Holiday, and Apprentice Training trust funds filed a motion to intervene. The motion was granted; thereafter, Intervenor's counsel participated actively throughout the hearing.)

Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence pertinent to the issues. Since the hearing's close, briefs have been received from General Counsel's representative, together with Intervenor's and Respondent Union's counsel. These briefs have been duly considered.

FINDINGS OF FACT

Upon the entire testimonial record, documentary evidence received, and my observation of the witnesses, I make the following findings of fact:

I. Jurisdiction

Respondent Union has raised no question herein with respect to General Counsel's jurisdictional claims. Upon the Consolidated Complaint's relevant factual declarations, I make the following factual determinations.

Associated General Contractors of California, Inc., herein called AGC; Building Industry Association of California, Inc., herein called BIA; and Engineering and Grading Contractors Association, Inc., herein called EGCA, are trade associations of contractors, comprised of numerous employer members, which exist for, and engage in, collective bargaining; they negotiate collective-bargaining contracts on behalf of their respective employer members with various labor organizations, including Respondent Union herein. Throughout the period with which this case is concerned, Griffith, Nicks, and Security, California corporations, have been AGC employer members. The various contractor members of AGC, BIA, and EGCA, for whom these trade associations have jointly negotiated and signed a multi-

employer, multi-association collective-bargaining contract with Respondent Union herein—which group includes Griffith, Nicks and Security previously noted—are currently engaged in business within Southern California as building and construction industry contractors. They maintain their principal offices and places of business within the State of California; taken as a group, they purchase and receive supplies valued in excess of $50,000 annually, which come to them directly from out-of-state suppliers.

Sukut-Coulson and V & L Construction, California corporations, likewise maintain their principal offices and places of business within that state; they are likewise, engaged in business as Southern California building and construction industry contractors. Each purchases and receives supplies valued in excess of $50,000 annually, directly from out-of-state suppliers.

Urban Pacific Corp. and Gary M. Budd, Jim Comaianni Construction Co., a joint venture; Urban Pacific Construction Co., Inc.; Urban Pacific Construction Co.; Jim Comaianni Construction Co.; Jim Comaianni Construction Company & Urban Pacific Const. Co., Inc., a joint venture; Urban Pacific Corp.; Lark Construction Co., Inc.; Jim Comaianni Construction Co., and Urban Pacific Construction Co., a joint venture; Urban Pacific Construction Co., Inc. and Jim Comaianni Construction Co., *et al*; Urban Pacific Construction Co., Inc. and Jim Comaianni, a joint venture—collectively designated as Urban Pacific herein—are, and have been at all times material herein, engaged in business as Southern California underground piping and sewer-laying contractors, serving the building and construction industry. At various times, during the period with which

this case is concerned, the Five Contractors previously designated have subcontracted to Urban Pacific the performance of underground piping and sewer-laying work at several Southern California construction projects.

With matters in this posture, I conclude and find that the various employer members of AGC, BIA, and EGCA, including Griffith, Nicks, and Security particularly, together with Sukut-Coulson and V & L Construction, are, and have been, at all times material, employers engaged in commerce or in a business affecting commerce within the meaning of Section 8(e) of the Act, and persons engaged in commerce or in an industry affecting commerce within the meaning of Section (b)(4)(ii)(B) of the statute. Likewise, I conclude and find that Urban Pacific is, and has been, at all times material, a person engaged in commerce or in an industry affecting commerce within the meaning of these designated statutory provisions. With due regard for presently applicable jurisdictional standards, I find the proposed assertion of Board jurisdiction, in this case, warranted and necessary to effectuate statutory objectives.

II. Respondent Union

International Union of Operating Engineers, Local Union No. 12, designated as Respondent Union within this decision, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits to membership certain employees of various AGC, BIA, and EGCA employer members, Sukut-Coulson, V & L Construction, and Urban Pacific respectively.

III. The Unfair Labor Practices

A. *Issues*

General Counsel charges Respondent Union with unfair labor practices, herein, bottomed upon certain provisions of Respondent Union's current contract with the particular Contractor Associations previously designated, together with certain conduct—purportedly undertaken in Respondent Union's behalf—consistent with those provisions.

The contractual clauses in question are characterized as violative of Section 8(e) of the statute, *per se,* because their thrust—realistically considered—is purportedly secondary in nature, and because they cannot be considered privileged by the designated section's construction industry proviso. Further, General Counsel charges Respondent Union with responsibility for a demand—purportedly made by representatives of the Operating Engineers Health and Welfare Fund, Pension Trust, Vacation-Holiday Fund, and Southern California Operating Engineers Apprentice Training Trust, collectively designated as Trust Funds herein, functioning in Respondent Union's behalf—that the Five Contractors previously designated should pay the Trust Funds certain *pro rata* sums sufficient to cover delinquent contributions which various Urban Pacific enterprises purportedly owe these funds. Within his Complaint General Counsel charges that Respondent Union, through its statutory agents—more particularly the Trust Funds noted—threatened to strike and shut down all Southern California construction projects of these Five Contractors where employee members of Respondent Union were then working, should these Five Contractors fail to proffer the contributions specified. Re-

spondent Union's demand, coupled with its purported threat, is characterized as violative of Section 8(b)(4)(ii)(B) of the statute.

Respondent Union contends that the contractual provisions herein challenged should be considered primary in nature; that they were drafted and negotiated by spokesmen for the Contractors Associations and Respondent Union merely to protect the work and fringe benefit standards previously established for workers compassed within the questioned contract's so-called "principal work unit" particularly; and that both the challenged contract provisions and consequent Trust Fund efforts to invoke or enforce them should, therefore, be considered lawful. No significant conflicts have been presented for Board resolution with respect to the actual situation giving rise to the present controversy; the present record, therefore, presents nothing more than a legal question.

B. *Facts*

1. The Master Labor Contract

The contract with which we are presently concerned is designated the Master Labor Agreement between Southern California General Contractors and Respondent Union. It was negotiated and signed with a July 1, 1969, effective date, to remain in effect until July 1, 1974, with a conventional renewal provision calling for its continuation—under certain circumstances—from year-to-year thereafter. The contractor members of the various trade groups privy thereto, previously noted generally, are engaged in construction, survey work and asphalt production within eleven contractually specified Southern California counties, exclusive of San

Diego County; the master contract purports to cover persons working for these contractors, within Respondent Union's recognized jurisdiction, both on construction job sites and within the particular contractors' yards and shops. Its worker coverage includes a wide variety of job classifications, defined and compassed within nine contractually-specified groups. With respect to persons performing work within these given job classifications, the master contract contains detailed provisions governing their wages, hours and working conditions, together with Union recognition, strike-lockout, and jurisdictional dispute clauses, grievance settlement provisions, and certain further provisions conventionally found in collective-bargaining contracts. The agreement, likewise, provides various fringe benefits for covered workers; specifically, these fringe benefits compass a health and welfare plan, pensions, and pay for vacations and holidays.

Since many workmen, within the building and construction industry, frequently shift their employment from one contractor to another as various construction projects start and finish, a method has been provided whereby such workmen may receive proper credit for their earned fringe benefits. This is currently being done—pursuant to several separate Agreements and Declarations of Trust previously negotiated—by requiring each contractually covered employer to file regular monthly reports, listing the hours worked by his employees within contractually-designated job classifications; and to pay separately computed sums calculated with regard for the total number of monthly hours which such employees may have worked, into Trust Funds which Respondent Union and the various Con-

tractors Associations maintain and jointly administer. In turn, these Trust Funds are required—pursuant to their respective Trust Agreements previously noted—to credit their records, separately maintained for each workman listed, with the total monthly working hours which his employer may have reported, and to disburse earned benefits pursuant ot the terms and conditions defined therein.

Should any contractor bound by the Southern California Master Labor Agreement become delinquent with respect to Trust Fund contributions, the concerned fund or funds must report such a delinquent contractor to each Contractors Association and Respondent Union, monthly. Preliminarily, however, the Master Labor Agreement provides—within Article I, Paragraph B-14 specifically—that the Trustees of the Trust Funds, through their Administrator regularly retained:—

> . . . shall give written notice to a delinquent Contractor or Subcontractor, with a copy to the Union, advising him to correct a delinquency within ten (10) days of the giving of such notice. The Union shall withhold services from any or all jobs of such delinquent Contractor or Subcontractor after said ten (10) day period if the delinquency is not corrected . . .

The Trust Funds Administrator, likewise, may—following a failure of negotiations or consultation with any contractor looking toward the collection of his purportedly delinquent payments—commence legal proceedings against such a delinquent contractor. The Master Labor Agreement, however, provides—further—that trustees of the Trust Funds, through their Administrator duly designated, may initiate procedures whereby contractual-

ly-committed contractors may become liable for various accrued or current delinquencies of their subcontractors, likewise covered by the Master Labor Agreement with which we are now concerned. The relevant clauses in this connection are the clauses which General Counsel has, herein, challenged; they read in full as follows:

> Article I, Paragraph B-15. The Trustees of the Trust Funds, through their Administrator, shall furnish each Contractors Association and the Union, with a list of delinquent Contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquent list until such Contractor has paid all delinquent monies to the various Trust Funds.
>
> (a) Any disputes between the parties concerning the payment or nonpayment of monies due the Trust Funds are not subject to Article V [Procedure For Settlement of Grievances and Disputes] of the Agreement.
>
> 16. In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums over to the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Contractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date of the delinquency list on which the Subcontractor's name first appeared. The Contractor shall terminate the contract of the Sub-

contractor who fails to properly correct his delinquency.

(a) Where the Contractor fails or refuses to make payments required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor.

On their face, these clauses seemingly require a prime or general contractor to refrain from subcontracting any portion of his current project or projects with another contractor—likewise bound by the Master Labor Agreement herein—listed as delinquent within any previously-disseminated Trust Fund delinquency list, unless such a listed contractor has, since the list's dissemination, settled his Trust Fund delinquencies. Should the prime or general contractor, nevertheless, negotiate a subcontract with a previously-listed delinquent firm, that prime or general contractor will, essentially, become a guarantor for his newly-engaged subcontractor's previously "accrued" delinquencies. When a previously nondelinquent subcontractor, however, becomes delinquent after commencing his work for a prime or general contractor, the latter may become liable merely for "delinquencies incurred on the job" following a contractually-defined grace period.

These quoted contractual provisions are clearly designed to serve a dual purpose. *First:* They define the means whereby the Trust Funds Administrator, together with concerned prime contractors, may put pressure on some delinquent subcontractor to remedy his own delinquency, whereby the possible loss of his current subcontract may be forestalled. *Second:* They promote compliance with certain procedural steps reasonably calculated to safeguard the fringe benefit eligi-

bility prospects of the particular subcontractor's concerned employees, while promoting the financial integrity of the Trust Funds involved, by insuring that, if such a subcontractor cannot or will not settle his contribution delinquencies, another responsible party will—in his stead—provide the Trust Funds with the requisite sums due.

The General Counsel essentially, contends, herein, that these contractual provisions—by virtue of their specific language or those foreseeable consequences which would necessarily follow their projected implementation with respect to particular situations—have a secondary thrust, since they expressly require a prime or general contractor to "cease doing business" with the subcontractor with whom Respondent Union may have a primary dispute, and since they penalize him financially should he thereupon fail to terminate their business relationship.

2. The Short Form Contracts

All contractor members of the three trade associations previously noted are, concededly, bound by the Master Labor Agreement's provisions, with respect to work performed within the eleven-county Southern California territory which that contract covers. In addition to such Contractors Association members, however, other persons—likewise engaged in building and construction industry work within this selfsame Southern California territory—may become parties to the Master Labor Agreement by signing so-called "Short Form" contracts. These, substantially, paraphrase most of the Master Labor Agreement's provisions, or may adopt them by reference. Signatory contractors, thereby, recognize Respondent Union as the statutory representative of their

employees, and agree to be bound by most of the Master Labor Agreement's terms; their commitments *inter alia,* compass a contractual obligation to make required monthly reports and submit contributions, payable to the Trust Funds, for their employees' vacation and holiday pay, health and welfare coverage, and pension benefits.

3. The Trust Funds

a. *The Structure of the Funds*

Though the Master Labor Agreement refers to the Trust Funds and contains provisions—previously noted —dealing with the handling of delinquencies, the Operating Engineers Health and Welfare Fund, Pension Trust, Vacation-Holiday Savings Trust, and Southern California Operating Engineers Apprentice Training Trust were each created by separately executed Agreements and Declarations of Trust signed by Respondent Union, the three trade associations previously noted or their predecessors, and several additional contractor groups.

> (Since these Trust Funds were established at various times between 1954 and 1964, the Contractors Association parties initially privy to their Agreements and Declarations of Trust vary. Most were established by Respondent Union in conjunction with Contractors Association groups which included, but were not limited to, those privy to the Master Labor Agreement with which we are herein concerned. The parties have stipulated that the Trust Funds in question were created, pursuant to 29 U.S.C. 186(c)(5) and (6), to receive and hold in trust fringe benefit contributions payable under various collective-bargaining

contracts, including the Southern California Master Labor Agreement currently in force.)

Each fund is controlled by a Board of Trustees, with equal numbers of Union and Contractors Association members. The several trustees are appointed by the Contractors Associations and Respondent Union respectively. They serve until death, incapacity, resignation or removal. Trustees may, however, be removed at will, with or without cause, by the party responsible for their designation. Substantially, the several trust declarations vest each designated Board of Trustees with power and responsibility for "the continuing supervision, control and direction of [the designated fund] for the uses, purposes, and duties set forth" therein. The several boards, therefore, are responsible for collections, investments, settlement of benefit schedules, and disbursements thereunder.

The four boards, since September 1, 1972 specifically, have—so the record shows—contracted with a tax-exempt, nonprofit service corporation, designated as Southern California Operating Engineers Benefits Administration, Inc. for the diurnal conduct of Trust Funds operations. In turn, that corporation, currently, hires a Trust Fund Administrator, together with his required staff personnel—some 70 in number—for the purpose of conducting the Trust Funds day-to-day business.

(The corporation has a Board of Trustees which consists of Trust Fund trustees. All Trust Fund trustees are "members" of the corporation.)

The Administrator provides services of a ministerial nature to the several Boards of Trustees, whereby their regular functions can be discharged. *Inter alia,* the

Administrator is responsible—subject to the discretionary authority and supervision of a committee of trustees, called the Joint Contribution Committee, representing the several Boards of Trustees concerned—for the collection of regular payments from those employers who are collectively committed to make Trust Fund contributions, pursuant to their collective-bargaining contracts with Respondent Union herein.

b. *The Coverage of the Funds*

As previously noted, the Trust Funds were created by a number of Contractors Associations, with AGC, BIA or its predecessor, and EGCA constituting merely a portion of the total number of employer groups concerned. Currently, so the record shows, the Trust Funds receive contributions pursuant to various collective-bargaining contract commitments—totalling approximately $5,000,000 per month—from some 2,500 general and specialty contractors.

> (The collective-bargaining contracts mentioned specifically obligate the contractors privy thereto to "abide by" the provisions of the several trust agreements, and to pay contributions at hourly rates stated therein. On July 1, 1973, the contribution rates per employee totalled $2.57 per hour worked, distributed as follows: $.75 to the Health and Welfare Fund; $1.50 to the Pension Trust; $.30 to the Vacation-Holiday Savings Trust; and .02 to the Apprentice Training Trust.)

A substantial number of these contractors—not specified for the record—are contractually committed through some *eleven* general contractors associations, which represent and bargain for firms doing business throughout San Diego County, eleven other Southern

California counties, and Southern Nevada specifically. Others are contractually committed through their membership in, and representation by, various specialty contractors associations. Many contractors are committed to make Trust Fund contributions, however, by virtue of their contractual privity with Respondent Union pursuant to "Short Form" contracts separately negotiated.

The record, herein, reflects a purportedly "informed" guess that some 40,000 workmen, represented for collective bargaining purposes by Respondent Union herein, currently hold hourly "credits" recorded in separately-maintained accounts with the Operating Engineers Health and Welfare, Pension, and Vacation-Holiday trust funds, by virtue of their work histories with contributing contractors; they constitute, therefore, these funds' current and prospective beneficiaries. Not all such workmen, however, are currently employed with Southern California or Nevada firms. During an average month the trusts receive reports and contributions on some 25,000 workmen. Some are normally peripatetic, and may—at various times—work both within and without the geographical territory with which we are concerned; other workers, who may have worked in Southern California previously, may have since left the territory, or given up positions within the Southern California building and construction industry, without accumulating sufficient hourly work credits to qualify for those fringe benefits which the Trust Funds provide. Their records, however, are maintained by the various Trust Funds, nevertheless.

Under the particular Master Labor Agreement with which we are presently concerned, some 17,000-18,000

Southern California workers are represented, and may qualify for Trust Fund coverage. The record, herein provides no basis for a determination with respect to how many of these may be acquiring hourly work "credits" recorded by the various Trust Funds through current employment with AGC, BIA or EGCA member contractors. Leo A. Majich, the Trust Funds Administrator, declared his belief, however, that some 60% of the contributions received for work done within the eleven-county territory covered by the Master Labor Agreement are received from AGC, BIA and EGCA members contractors—who do most of Southern California's major construction work—with most of the remaining 40% being received from "Short Form" signatory firms.

c. *Procedures With Respect To Delinquency Collections*

One function of the Trust Funds Administrator, necessarily, relates to the collection of delinquent contributions. Contractors bound to provide contributions pursuant to collective-bargaining contracts—designated, throughout the present record, as signatory contractors —receive blank forms mailed monthly from the Trust Funds office, wherein they may report the names of their "operating engineer" workers, and their hours worked, during the previous month. These forms, properly completed, must be returned—with the concerned contractor's contribution check—not later than the twentieth day following the conclusion of the month covered thereby; reports are considered delinquent if they have not been received by that date.

(Contribution payments, when received, are deposited—for each trust—within that particular

trust's "common pool" bank savings account; no separate records are maintained regarding the total contributions thereto made by particular contributing employers.)

Should a contractor neglect or fail to file his report, submit it late, fail to report correctly the hours worked by his employees, or fail to attach his properly computed payment for the full contribution amount required, the administrator's office will seek to resolve any possible "clerical errors" or "minor problems" through a telephone contact. Should such a contact, however, reveal a problem more substantial than clerical error, which the contractor may not be prepared to resolve, the Trust Funds will issue a so-called Ten Day Delinquency Notice directed to him, with a copy to Respondent Union herein. Should the contractor, thereafter, fail to remove his delinquency within the designated ten-day period, his firm will be placed on the funds' official delinquency list, dispatched to the concerned Contractors Associations, Respondent Union and other interested signatory employers, pursuant to Article I, Paragraph B-15 of the Master Labor Agreement, previously noted. The Master Labor Agreement requires the publication of a delinquency list monthly; in practice, however, such lists are currently being prepared and published weekly.

When the Health and Welfare Fund was initiated, (1954), hourly contributions were quite low; over the years, with new trusts established and contribution rates raised, they have increased substantially. The record warrants a determination—which I make—that the degree of delinquency with respect to various Trust Fund contributions, and the total sums involved, have become

"bigger problems" with the passage of years, as fringe benefit contributions have become a larger and larger part of the total "cost package" which contributing contractors have been required to sustain. By June 14, 1973, the total *known* delinquencies of 177 so-called "active" contractors amounted to $295,000 minimally; further *known* delinquencies totalling $534,000 were considered chargeable to 174 so-called "inactive" contractors.

Administrator Majich, summoned as Intervenor's witness, further testified—credibly and without contradiction—that "Short Form" contract signatories regularly constitute a substantial majority of listed delinquents; that such contractors frequently change their business name or the legal form in which they transact business; that many, likewise, change their "official" headquarters or place of business frequently; and that quite a few provide no address information beyond a post office box number through which communications may reach them.

> (The Trust Funds June 14, 1973, delinquency list for contractors currently "active" within the Southern California building and construction industry contains the names of 177 delinquents; of this number, 131 purportedly were "Short Form" contract signers. A concurrently published compilation, with respect to currently "inactive" contractors, lists 174 delinquents; of this number, 135 are coded as committed to "Short Form" contracts. Many firms, on both lists, show P. O. box number addresses, merely.)

With matters in this posture, so the record shows, the Trust Funds Administrator may, in many cases,

experience difficulty with respect to locating delinquent contractors, and with respect to determining the nature, size, and reason for their delinquencies. To assist him in locating contractors directly responsible for payments withheld, verifying their delinquencies, and maximizing collections, the Administrator maintains a staff of some 15 field representatives, responsible directly to his office. Additionally, he hires auditors, or may engage independent certified public accounting firms, for the purpose of conducting regular, periodic or random payroll audits; these may cover both reporting and non-reporting contractors with known or newly-discovered places of business.

Once a given contractor's delinquency is determined, the Trust Funds Administrator, functioning on behalf of whatever trust or trusts may be concerned, may demand and seek the prompt removal of such a delinquency, through negotiations or legal process. When such procedures produce positive results, leading to a complete settlement of the delinquency by the contractually-committed firm directly responsible—either through payment in full or by installment remittances—no further corrective steps need be taken.

When, however, delinquent contractors cannot be located, persuaded or compelled to proffer their contractually-required contribution payments, the Trust Funds Administrator may—pursuant to Article I, Paragraph B-16 of the Master Labor Agreement herein—seek other contractors, likewise committed to make fund contributions, for whom such delinquent enterprises may have performed services under subcontracts.

(This search for prime or general contractors, for whom a delinquent firm may have performed

subcontract work, may frequently, present difficulties. The Trust Funds have no ready access to data, records or reports which reveal where particular delinquent contractors may have been performing subcontracts. The Administrator may receive relevant information with respect thereto, however, from his field representatives, Union business representatives, or workmen—previously employed by delinquent subcontractors on some prime contractor's construction jobsite—complaining that particular Trust Fund benefits for which they should be considered qualified have been, without reason, questioned, reduced or denied. Further, such information may, sometimes, become available through "haphazard, hit-or-miss" discoveries by Trust Fund auditors when checking the records of contributing employers. Normally, these auditors merely review a contributing employer's payroll records. These records, ordinarily, do not reveal the jobsite location where particular employees may have worked; neither do such records, ordinarily, reveal the names of those prime or general contractors for whom the enterprise being checked may have performed subcontract work. Administrator Majich, within a sworn statement proffered and received for the record, declared that it would be "highly unusual" for Trust Fund auditors to procure such information, though the particular employer whose records were being checked might voluntarily provide it.)

Whenever the Trust Funds discover prime or general contractors for whom known delinquents have performed, or currently are performing, subcontract work, such contractors are notified regarding their possible

responsibility for the settlement of their former or current subcontractor's Trust Fund delinquency. Under normal circumstances, so Administrator Majich testified, discussions then begin—between Trust Fund representatives, spokesmen for the prime or general contractors, and, possibly, the delinquent subcontractors concerned—looking toward the development of some mutually satisfactory consensus regarding the delinquency's removal. Should the prime or general contractor commit himself to settle his subcontractor's delinquency, completely or partially, he may—consistently with Article I, Paragraph B-16 of the Master Labor Agreement previously noted—withhold sufficient funds from any monies due or to become due his subcontractor, and remit whatever sums may be required directly to the Trust Funds concerned. All payments proffered with respect to delinquencies, whether made by the contractor directly responsible therefor, or by some guarantor contractor, become part of the "common [fund] pool" which each concerned Trust maintains, while notations regarding the working hours covered by such contribution payments are recorded and credited, separately, for the various workmen entitled thereto.

4. The Urban Pacific Delinquency

When delinquencies with respect to reports or payments by contractors are first noted, the problems posed with respect to such contractors are reviewed by a bipartite subcommittee of Trust Fund trustees known as the Joint Contributions Committee. That Committee, some time during 1971, directed that the payroll records of Lark Construction Co., Inc. and Urban Pacific Company, a successor—two "Short Form" contract signatory members of the Urban Pacific

group—should be checked. The resultant audit disclosed a substantial amount of Trust Fund contributions due and unpaid. Field representatives of the Trust Funds Administrator could not locate the firms in question, thereafter, working on some active construction project. Their disclosed delinquencies were, thereupon, referred to legal counsel; the firms, however, could not be located for the purpose of serving summons and complaint. Thus, for some time, no specific collection efforts could be made.

The Trust Funds' delinquent employers list for April 20, 1972, contained the name of one firm within the so-called Urban Pacific group—Urban Pacific Construction Co., Inc.—which was listed with a Long Beach, California, business address. That firm—designated as privy to trust commitments through a labor contract with Respondent Union purportedly negotiated and signed by the Underground "Eng. Cnt" Association, wherein the firm purportedly held membership—was listed as delinquent because it was allegedly failing to submit Trust Fund contributions, despite its submission of monthly reports pursuant to which such contributions would have been required. With respect thereto, January 12, 1972, was shown as the date on which the Trust Funds' Ten Day Delinquency Notice had been dispatched.

> (Presumably, the Trust Funds had listed Urban Pacific Construction Co., Inc. as delinquent within the first list published ten or more days thereafter. However, delinquency lists containing the corporation's name—prepared and published between January 22nd and April 20th specifically—have not been proffered for the present record. General Counsel has submitted limited segments of various

delinquency lists prepared and published between April 20th and December 28, 1972, merely.)

Beginning April 27th, the Trust Funds changed their reporting procedure; they prepared and published two delinquency lists. Within the first, published weekly, delinquent employers considered still "active" within the Southern California territory with which we are concerned were listed; within the second, delinquent employers currently considered "inactive" within the Southern California building and construction industry, for various reasons, were catalogued. Urban Pacific's name continued to appear, within the Trust Funds' so-called "active" delinquency lists, between April 27th and July 20, 1972. The July 27th compilation, however, contained no Urban Pacific listing; this situation continued until the Trust Funds October 19th delinquency list was published.

(Possibly, the firm in question may have been listed on the so-called "inactive" compilation, which the Trust Funds were then preparing and publishing monthly. Administrator Majich so testified; the record, however, provides no basis for a determination in this regard.)

Within the list last designated, Urban Pacific Construction Co., Inc. was again, shown as delinquent, this time with a South El Monte, California, address. The firm was, this time, characterized as committed to make Trust Fund contributions pursuant to a so-called "Short Form" contract with Respondent Union herein: October 9th was designated as the date on which its relevant Ten Day Delinquency Notice had been dispatched, purportedly because of the firm's failure to file required reports.

(The record contains a stipulation that the various business entities collectively designated as Urban Pacific have been, *at all times material herein,* parties to a so-called "Short Form" contract which embodies the terms of Respondent Union's Master Labor Agreement, including the provisions challenged in this proceeding.)

This listing remained unchanged through November 30, 1972; between December 15th and December 28th, however, the firm was listed as delinquent for several different reasons, with a new November 20, 1972, delinquency notice date.

On various dates during the nine-month period which we have been considering, however, several constituent firms within the Urban Pacific group procured subcontracts—nine in number—calling for the performance of underground pipe and sewer work, connected with Southern California construction projects, with respect to which the Five Contractors previously designated were, separately, functioning as prime or general contractors. Specifically, between May 2nd and July 20th, Nicks awarded two such subcontracts, while Security accepted a single Urban Pacific proposal. Both Sukut-Coulson and V & L Construction, likewise negotiated single subcontracts.

(Within this decision, reference has been made, previously, to the fact that Nicks and Security were, and remain, AGC member contractors. Sukut-Coulson, which maintains no AGC, BIA, EGCA membership, has been, throughout the period through which this case is concerned, privy to a separate "Short Form" collective-bargaining contract with Respondent Union pursuant to which

various terms and conditions set forth within the Master Labor Agreement, including those challenged herein, have been adopted by reference. V & L Construction and Respondent Union have had no direct contractual relationship. The record warrants a determination, however, that V & L Construction negotiated for Urban Pacific's services in connection with a construction project with respect to which V & L Construction was merely a subcontractor or so-called "voluntary representative" for Zurn Corporation; the latter firm—so counsel have stipulated—held, and currently holds, BIA membership. For present purposes, General Counsel, Respondent Union and Intervenor agree that Zurn was—throughout the period with which this case is concerned—the real prime contractor with which Urban Pacific held subcontracts.)

During this period—as previously noted—Urban Pacific Construction Co., Inc. was a listed delinquent contractor. The record is silent with respect to Sukut-Coulson's knowledge in that connection. However, it [the record] warrants a determination—which I make—that weekly Trust Fund delinquency lists, containing Urban Pacific's name, were then being supplied, regularly, to AGC and BIA, the Contractors Associations wherein Nicks, Security and Zurn Corporation held membership.

On August 1st, Griffith subcontracted with Urban Pacific for a City of Los Angeles street improvement project; when the subcontract was signed, Griffith's management had, most recently, received the Trust Funds July 20th delinquency list of so-called "active" contractors; as previously noted, Urban Pacific's name

appeared therein. The July 27th list of so-called "active" delinquents—which did not contain Urban Pacific's name—had not yet been received from Griffith's source.

> (The record reveals, without dispute, that Griffith normally received its delinquency list copies some 6-8 days following their nominal issuance date. I so find.)

Shortly thereafter, on August 3rd specifically—during the period, previously noted, when Urban Pacific's name was not being listed in Trust Funds delinquency lists of presumptively "active" contractors—Zurn/V & L Construction granted a second subcontract to a joint venture comprised of two firms within the Urban Pacific group. Finally—during December, 1972, particularly—Urban Pacific received two more subcontracts, from Zurn/V & L Construction and Sukut-Coulson, respectively; these latter contracts were negotiated—so the record shows—during a period when Urban Pacific Construction Co., Inc. was, once more, being designated a Trust Fund delinquent.

During January, 1973, a Trust Funds field representative discovered a joint venture—composed of two Urban Pacific group members—doing subcontract work in connection with a Nicks construction project. Further investigation, thereafter, revealed the joint venture's additional subcontracts with Security, Griffith, Zurn and Sukut-Coulson; these firms were, thereupon, notified of their responsibility for the payment of Urban Pacific's delinquency. On February 2, 1973, following a conference with the Trust Fund's Administrator, representatives of Nicks, Security and Sukut-Coulson reached a consensus—so the present record shows—that each of them, as prime contractors, would promptly pay

one-seventh of Urban Pacific's total delinquency, pending a further search for more contractors who might possibly be jointly responsible therefor, and that—thereafter—each responsible contractor would pay a proportionate share of Urban Pacific's required contributions.

> (Griffith and Zurn, though not represented, were —so I find—told of this conference. The record further warrants a determination, which I make, that they were subsequently told of the decisions therein reached.)

Security and Zurn's representative, V & L Construction, subsequently paid their committed one-seventh of Urban Pacific's purported $27,000 plus delinquency; they paid approximately $4,000 each. The record, however, warrants a determination, which I make, that these were the sole payments which the Trust Funds received.

> (Griffith's corporate secretary, summoned as General Counsel's witness, testified that a Trust Funds representative subsequently requested his firm to pay one-fifth of Urban Pacific's total delinquency, which would have approximated $5,400; presumably, this Trust Funds demand was made because no more prime contractors, beyond the Five Contractors previously mentioned herein, could be found jointly responsible. The record does not disclose whether the requested payment was made; presumably it was not. Griffith's corporate secretary testified, without contradiction, that—had his firm been considered liable solely for Urban Pacific's current delinquency with respect to its August 1, 1972, Griffith subcontract—something less than $1,000 would have been required to satisfy

the firm's contractually-mandated derivative or guarantor responsibility for Urban Pacific's contributions.)

On or about February 12, 1973, therefore, the Trust Funds Administrator notified Verne W. Dahnke, Respondent Union's treasurer and a trustee of three concerned trusts, that—consistently with Article I, Paragraph B-16(a) of the Master Labor Agreement, previously noted—the Respondent Union had the "right to withhold services" from "any or all jobs" of the Five Contractors herein.

Some further discussion with legal counsel for these Five Contractors, however, followed. The Trust Funds records, when reviewed further, revealed—so the parties have stipulated—that various member firms comprising the Urban Pacific group, when the instant dispute arose, merely owed a total $18,386.46 sum in delinquent Trust Funds contributions. On or about March 7, 8, 9, and 14, 1973, the Trust Funds' counsel declared, during a series of telephone conversations with counsel for the Five Contractors, that—should the latter fail to satisfy Urban Pacific's verified contribution delinquency, the Trust Fund's Administrator would, pursuant to the contractual provision previously mentioned, renew his notice to Respondent Union regarding its right to withhold services from various Five Contractors construction projects.

The record provides no clue with respect to whether the Trust Funds Administrator did, really, renew his notice. So far as the present transcript shows, no work stoppage took place, thereafter, with respect to Five Contractors' projects.

(The record does warrant a determination—which I make—that, when Sukut-Coulson was told about Urban Pacific's delinquency, that firm hired a number of Urban Pacific's workmen and, thereafter, directly performed the work which Urban Pacific would otherwise have performed pursuant to subcontracts. With respect to comparable steps which Nicks, Security and Zurn may have taken, however, the record is silent. Urban Pacific's subcontract with Griffith was completely performed several months before Griffith was told that it would be held responsible for a *pro-rata* contribution bottomed upon its subcontractor's previously accrued delinquencies.)

Nevertheless, the present "CC" and "CE" charges, with which we are now concerned, were filed—as previously noted—on March 8th, while counsel for the Trust Funds and Five Contractors were reviewing the situation and recapitulating their respective positions.

C. *Discussion and Conclusions*

1. The Basic Issues Restated

With matters in this posture, we reach the basic question herein: Whether or not General Counsel has persuasively demonstrated Respondent Union's participation in statutorily-proscribed conduct, directly or vicariously, within the meaning of Section 8(e) and Section 8(b)(4)(ii)(B) of the statute.

As previously noted, General Counsel contends that certain contractual provisions challenged herein possess a forbidden secondary thrust. Further, he seeks a determination that Respondent Union's purported attempt to both effectuate and enforce the provisions in question—through a course of conduct followed, unilaterally, by that body's alleged Trust Fund surro-

gates—likewise carried a secondary thrust, violative of law. More particularly, General Counsel contends:—

(1) That Article I, Paragraph B-15 of the Master Labor Agreement herein—which reflects a commitment that contractors privy thereto "will not subcontract" portions of their jobs to listed delinquent contractors—clearly reveals a statutorily proscribed "cease doing business" objective.

(2) That Paragraph B-16, when read in conjunction with Paragraph B-15 previously noted—more particularly B-16's first sentence, which purportedly "penalizes" prime or general contractors who may use delinquent subcontractors, by making them "liable" for their delinquent subcontractor's *previously accrued* delinquencies—likewise possesses a forbidden "cease doing business" thrust.

(3) That Paragraph B-16's final sentence—which provides that contractually-committed firms "shall terminate the contract of the subcontractor who fails to promptly correct his delinquency" whenever such a delinquency arises following the commencement of the subcontractor's work—should, likewise, be considered patently proscribed.

Confronted with General Counsel's contentions, Intervenor's counsel counters—with Respondent Union's concurrence and support—that these challenged contractual provisions should be considered lawful because their primary purpose cannot properly be considered statutorily forbidden. More particularly, Intervenor's counsel suggests that these contractual provisions merit construction as designed, primarily, to protect and maintain union standards—namely, currently viable health and welfare, pension and vacation-holiday pay programs negotiated, *inter alia*, for the benefit of those "operating

engineer" employees who work for contractually-bound contractors.

In this connection, further, Intervenor's counsel—while presenting a statement supportive of his motion to dismiss proffered during the hearing's course—noted a contention that:—

> . . . [All] of the employees covered by a single trust have . . . common interests . . . [To] the extent that an employee of one employer is participating in that trust and having part of his wages paid to that trust, he shares an interest with all employees covered by the trust *and has a right to bargain . . . with his own employer,* to cover all aspects relating to [the] integrity and the care and the administration of those trust funds (Emphasis supplied).

Counsel suggests, therefore, that—regardless of some conceivable "cease doing business" thrust which particular contractual provisions designed to promote such goals may have—their susceptibility to such construction should be be considered sufficient to render those provisions unlawful.

Respondent Union contends, further, that it should not be considered liable for the Section 8(b)(4)(ii)(B) violations herein charged, because the course of conduct which General Counsel challenges as violative of that statutory provision should properly be found chargeable to Trust Funds spokesmen or representatives functioning in behalf of various trusts, but not as Respondent Union's surrogates.

The principal legal question thus presented for resolution—which I have just summarized—has recently been considered, within a proceeding wherein General Coun-

sel has challenged the validity of certain comparable "delinquency" provisions, set forth within a Southern California master contract between a Teamster's Union joint council and the three Contractors Associations herein previously designated. *Joint Council of Teamsters No. 42, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America,* (Cases Nos. 21-CC-1424, 21-CE-122), Administrative Law Judge's decision, May 31, 1973. The case is presently before this Board, pending a final disposition, on General Counsel's exceptions duly filed. Administrative Law Judge Penfield's decision, therein, presents a comprehensive rationale for his final determination that several challenged provisions within the master contract before him—with respect to the rights, responsibilities and liabilities of contractors who deal or seek to deal with delinquent subcontractor firms—should be considered primary in scope and effect rather than secondary, and, therefore, beyond the statute's postscriptive reach. My review of the relevant legal principles which should be considered determinative herein—set forth below—reflects a partial restatement and paraphrase of Judge Penfield's comparable recapitulation, which I consider definitive; my conclusions regarding, (1) the validity of the contractual provisions challenged herein, and (2) the propriety of challenged conduct calculated to effectuate those provisions, derive from that review, plus some further factual and legal determinations bottomed upon the present record.

2. General Principles

Historically, Section 8(b)(4), the statute's so-called secondary boycott provision, was designed to limit the scope of industrial disputes. With due regard for its

proscriptive terms, certain described conduct, chargeable to labor organizations or their representatives, could be lawfully directed solely against employers with whom such labor organizations had primary disputes; their efforts to enmesh "unoffending employers and others" not directly involved with respect to such primary disputes were forbidden. *NLRB v. Denver Building Trades Council,* 341 U.S. 675, 692. This Board's subsequent decisions—with judicial concurrence —left these secondary boycott provisions, however, somewhat restricted in scope. The Board was considered mandated to proscribe certain union conduct directly leveled against secondary, rather than primary, employers; neutral secondary employers, however, were not considered protected where some contracting union and such a neutral employer had negotiated a contractual provision which required the latter to cease or refrain from doing business with firms which did not maintain certain union standards, or sign certain union contracts. *Local 1976, United Brotherhood of Carpenters and Joiners of America v. NLRB,* 357 U.S. 93. Such so-called "hot cargo" contractual provisions were first proscribed when Congress enacted Section 8(e), previously noted. This statutory section, in pertinent part, provides that:—

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other person, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter

> containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.—

This statutory language, taken literally, seemingly proscribes all contracts whereby employers agreed to "cease doing business" with other persons. This Board, however, currently considers such a literal construction inconsistent with the statute's legislative history; particular contractual provisions have, therefore, been found permissible—despite their conceivable "cease doing business" thrust—whenever they may be considered, essentially, directed toward the realization of primary, rather than secondary, goals. See *NLRB v. Joint Council of Teamsters No. 38,* 338 F.2d 23, 28 (C.A. 9). The Court of Appeals, therein, noted its concurrence with a respondent union's contention that:—

> . . . [S]ection 8(e) is not to be applied literally to prohibit all union-employer agreements limiting subcontracting. More particularly, an agreement which restricts subcontracting to protect the job opportunities of the employees of a signatory employer, and not to apply secondary pressure upon third-party employers, may be beyond the purpose of Section 8(e) and excepted from proscription.

Consistently with this view, the Board has frequently held that employers may lawfully agree to refrain completely from contracting out bargaining unit work, since

such clauses serve—primarily—to protect work being done by employees of the contracting employer within their bargaining unit, though they [the clauses] would, necessarily, require the contractually-committed employers—incidentally or secondarily—to cease dealing with other business enterprises. *Service and Maintenance Employees Union Local No. 399, AFL-CIO, (Superior Souvenir Book Company)*, 148 NLRB 1033; *Ohio Valley Carpenters District Council, (Cardinal Industries Inc.)* 136 NLRB 977, 986, *Milk Driver's Union Local No. 753 (Pure Milk Association)*, 141 NLRB 1237. However, contract clauses which reflect a clear purpose to blacklist some other specified employers, or classes of employers, because the concerned union considers their labor policies objectionable, will be found unlawful; such clauses are considered primarily calculated to limit or disrupt the signatory employer's business relationships with others, rather than to provide direct benefits and protection for bargaining unit workers. See *District No. 9 IAM v. NLRB*, 315 F.2d 33, 36-37 (C.A. D.C.); *NLRB v. Joint Council of Teamsters No. 38 supra*, at pp. 28-29, in this connection.

When confronted with specific contract provisions, this Board has—with judicial guidance and concurrence—defined several distinctions which it considers determinative throughout this general field of decisional concern. Within some cases, for example, distinctions have been drawn between so-called "work preservation" and "work acquisition" clauses; within other cases, distinctions have been drawn between so-called "union standards" and "union signatory" provisions. Where a challenged clause can reasonably be considered calculated to protect and preserve available or prospective work for the contractually-committed employer's rep-

resented employees, or to protect the wages and working conditions of his directly concerned bargaining unit workers—by limiting the contractually-committed employer's subcontractor privilege to business enterprises which maintain similar standards—such provisions will be considered lawful. *Meat and Highway Drivers Local No. 710 v. NLRB, (Wilson and Co.)* 335 F.2d 709, 713-716, (C.A. D.C.); *Truck Drivers Local 413 v. NLRB (Brown Transport Corp. and Patton Warehouse, Inc.)* 334 F.2d 539, 548, (C.A. D.C.); *Orange Belt District Council of Painters No. 48 v. NLRB,* 328 F.2d 534, 538-539 (C.A. D.C.); *Highway Truck Drivers and Helpers, Local 107, IBT (S. & E. McCormick, Inc.)* 159 NLRB 84, 96-102. Where, however, some contrary determination is found warranted—that a challenged provision is principally purposed to seek or acquire work for bargaining unit workers which employees of other business entities have customarily performed, or that such a provision is calculated to require a contracting employer to do business solely with other union contract signatories—the provision's thrust, vis-a-vis the particular contracting employer, will be considered secondary; more specifically, determination will be considered warranted that the contractual clause in question seeks to limit the number of enterprises with whom the contracting employer can do business, or to disrupt currently maintained business relationships. See *NLRB v. Joint Council of Teamsters No. 38, supra; Meat and Highway Drivers Local No. 710 v. NLRB, supra; Truck Drivers Local 413 v. NLRB, supra,* in this connection.

The relevant decisional principle, relied upon both by this Board and the courts when these distinctions must be drawn, has been defined, most cogently, within

Orange Belt District Council No. 48 v. NLRB, supra; therein, the Court of Appeals for the District of Columbia declared:—

> The test as to the "primary" nature of a subcontractor clause in an agreement with a general contractor has been phrased by scholars as whether it will "directly benefit employees covered thereby," and "seeks to protect the wages and job opportunities of the employees covered by the contract." We have phrased the test as whether the clauses are "germane to the economic integrity of the principal work unit," and seek "to protect and preserve the work and standards [the union] has bargained for," or instead "extend beyond the [contracting] employer and are aimed really at the union's difference with another employer."

The challenged provisions of the Master Labor Agreement herein—likewise compassed, solely by reference, within Respondent Union's numerous "Short Form" contracts—must, therefore, be reviewed, with due regard for the foregoing decisional principles, to determine their primary or secondary character.

3. The "Principal Work Units" Herein

When required to determine whether particular subcontractor clauses may properly be considered "germane to the economic integrity of the principal work unit" this Board has—within a concededly unique factual context—found the so-called "work unit" concept synonymous with its well-defined, statutorily-mandated "bargaining unit" conception.

Note particularly, with respect to this matter, those Board and Court cases wherein the so-called "Protective Wage Clause" and "80-Cent" provision found in various

United Mine Workers contracts have been considered. *Raymond O. Lewis, et al. (Arthur J. Galligan)*, 144 NLRB 228 (1963), 148 NLRB 249 (1964), remanded for further consideration, 350 F.2d 801 (C.A. D.C. 1965); *International Union, United Mine Workers of America (Dixie Mining Company)*, 165 NLRB 467 (1967), remanded for further consideration, 399 F.2d 977 (C.A. D.C. 1968); *W. A. Boyle, et al (Arthur J. Galligan and Dixie Mining Company)*, 179 NLRB 479 (1969), reversing 144 NLRB 228 on reconsideration, and dismissing complaint; *International Union, United Mine Workers of America, (Dixie Mining Company)*, 188 NLRB No. 121, 76 LRRM 1394 (1971), reversing 165 NLRB 467 on reconsideration and dismissing complaint; *International Union, United Mine Workers of America v. N.L.R.B.*, 468 F.2d 1139, 81 LRRM 2371 (C.A. D.C. 1972), dismissing a petition for review with respect to 179 NLRB 479, for lack of a justiciable case or controversy, and dismissing review proceedings, which the Court had previously initiated *sua sponte* with respect to 188 NLRB No. 121, for want of jurisdiction. During this protracted litigation—see 165 NLRB 467, at 468 particularly—the Board declared, consistently with certain intervening Court of Appeals decisions, that:—

> . . . [W]e conclude that the units which control the determination of the primary or secondary nature of subcontracting clauses are those units found by the Board under its customary standards to be appropriate for collective-bargaining purposes, and that such units in the present case are the single employer and multiemployer association units for which separate negotiations are conducted . . .

The Board was, then, considering the so-called "80-Cent" provision within the United Mine Workers most recent contract, finding that it constituted a statutorily proscribed "union signatory" clause.

Should the Board's preliminary determination within such a context—regarding the "principal work unit" question—be considered determinative, nevertheless, with respect to the comparable question which this case presents? Concededly, nothing within the specific Master Labor Agreement provisions with which we are now concerned purports to proscribe, control or define permissible business relationships between a contractually-committed employer and possible subcontractors who may not be contract signatories; Article I, Paragraphs B-15 and B-16, rather, set forth certain contractual rights, responsibilities, liabilities, and privileges with respect to contract signatory firms dealing with other contract signatories, solely.

Within their respective briefs, General Counsel's representative and Intervenor's counsel have proffered somewhat divergent views regarding the relevance, herein, of the Board's current "principal work unit" definition, noted. Their respective positions, however, can hardly be considered crystal clear.

General Counsel's brief suggests, preliminarily, that the Board's *United Mine Workers* language—herein quoted—should be considered broad enough to provide a definitive frame of reference, within which a required determination can be made regarding the primary or secondary nature of the clauses which he challenges. Subsequently, however, General Counsel's representative —still within his brief—seemingly proffers a different contention:

> Thus, it is submitted, the unit should be limited to employees of *a* signatory employer. Under the above-cited cases, the principal work unit must correspond to an appropriate unit under Section 9 of the Act; *i.e., the employees of one of the Five Contractors* or other signatory employers; by enforcing the clauses against *several signatories* to the Master Labor Agreement . . . Respondent is protecting union members generally, and such is clearly secondary activity (Emphasis supplied) . . .

Taken at face value, General Counsel's last submission, quoted, seems to suggest a contention that "work units" within the Southern California building and construction industry should be considered limited to the employees of single contractually-committed employers, even though such employers may be contractually bound solely by virtue of their membership in Contractors Associations signatory to master contracts.

Contrariwise, within their respective briefs, Respondent Union and Intervenor have suggested, initially, that —with particular reference to Trust Fund matters—the so-called "principal work unit" herein should be construed to compass, within a single industry-wide, area-wide group, the workmen employed by all employers, within the eleven-county Southern California territory which the Master Labor Agreement covers, contractually committed to make Trust Fund contributions, without regard to whether such employers are contractually bound by virtue of their association membership or through separately-signed "Short Form" contracts. Subsequently, however, intervenor's counsel seemingly suggests, within his separate brief, that—since we are

dealing, herein, with contractual provisions clearly designed to protect and maintain "union standards" without "union signatory" overtones—no determination need presently be made with respect to whether such provisions cover "operating engineer" employees within a single industry-wide, area-wide contract unit, or whether they cover such employees within a congery of multiemployer and single employer bargaining units.

(See, in this connection, *W. A. Boyle, et al* (*Arthur J. Galligan and Dixie Mining Company*), 179 NLRB 479, at 480, particularly Member Jenkins' concurrence.)

Intervenor's counsel would, naturally, have this Board conclude that Article I, Paragraphs B-15 and B-16 of the Master Labor Agreement constitute permissible "union standards" provisions, designed to protect and preserve the "economic integrity" of those fringe benefit programs with respect to which Respondent Union, AGC, BIA and EGCA have bargained. The Trust Funds, however, seem to suggest—within their brief—that such a determination can be made, upon this record, regardless of whether the provisions in question are construed to cover employees separately represented within closely related multiemployer and single employer bargaining units, or whether the concerned contractor employers are considered a single "work unit" with respect to Trust Fund matters.

With due regard for this Board's prior decisional announcements, however, I conclude that multiple bargaining units, defined in conformity with well-established principles which the statute mandates—rather than a single Southern California industry-wide unit coterminous with Trust Funds coverage—constitute the several

"principal work units" with respect to which Respondent Union may properly negotiate to preserve and protect fringe benefit programs and work standards. Throughout the *United Mine Workers* litigation previously noted, the Board has consistently so determined.

> (Note, in this connection, *Raymond O. Lewis, et al (Arthur J. Galligan)*, 148 NLRB 249, 253-254; *International Union, United Mine Workers of America (Dixie Mining Company)* 165 NLRB 467, 475-476; *W. A. Boyle, et al (Arthur J. Galligan and Dixie Mining Company)* 179 NLRB 479, 483-484; *International Union, United Mine Workers of America (Dixie Mining Company)*, 188 NLRB No. 121 (Slip Opinion ps. 6, 12, TXD pp. 36-37), 76 LRRM 1394, 1395, 1397, footnote 16. Within these decisions, the Board held—initially—that certain challenged contract provisions which it first characterized as so-called "union signatory" clauses carried a secondary thrust which Section 8(e) proscribes, when generally applied within a multiplicity of bargaining units rather than a single industry-wide unit. Later —following two judicially decreed remands—the Board concluded that both of these selfsame contract provisions should be considered permissible "union standards" clauses; nevertheless, it reaffirmed its prior determination that the contractually-defined congery of bargaining units, for which the disputed clauses had been separately negotiated, provided the context within which their Section 8(e) validity would have to be demonstrated.)

True, the Master Labor Agreement provisions challenged herein clearly purport to protect and maintain

current fringe benefit standards solely; the present record, considered in totality, clearly dictates a conclusion that they are purposed to preserve the financial stability and functional capability of contractually-mandated employee benefit programs. This Board's currently viable decisional doctrines, however, clearly require a determination that the so-called "work units" within which Respondent Union and concerned contractors may negotiate such work standards protection cannot be wider than their several "bargaining units" separately considered.

Some cogent arguments, conceivably, can be made that equating "work" and "bargaining" units for Section 8(e) purposes would, under some circumstances, be unrealistic. For example: The record, herein, reveals that Respondent Union's Master Labor Agreement, negotiated with AGC, BIA and EGCA jointly, and thereafter renegotiated with various "Short Form" contract signatories separately, does establish genuinely uniform work terms and conditions of employment, for the workmen employed by contractors privy thereto. Respondent Union, really, has negotiated a consensus which, in effect, provides for uniform industry-wide, area-wide conditions, despite its embodiment within numerous documents, nominally negotiated "unit by unit" and separately signed. Further, record testimony herein warrants a determination—which I make—that, when the concerned Contractors Associations and Respondent Union negotiated the particular Master Labor Agreement provisions which we are presently considering, they were looking beyond the strict confines of their own multiemployer AGC, BIA, EGCA bargaining unit. Both Respondent Union's negotiators and their counter-

parts within the contractor's group were, clearly, mindful of their mutually-felt need to deal with the wider problem of Trust Fund contribution delinquencies. Certainly, some reasonable arguments can be proffered, then, that—when these negotiators last met to revise their master contract—they were, particularly in this connection, bargaining for so-called "delinquency" provisions which would, eventually, cover all contractually-committed firms, both those bound by virtue of their association membership, and—likewise—those who would later signify their concurrence by signing "Short Form" separate contracts.

However, this Board's current decisional doctrine—see *Raymond O. Lewis et al, (Arthur J. Galligan)*, 148 NLRB 249, 253-254, particularly—presently forecloses a determination, herein, that—with respect to Trust Fund matters—the various Contractors Associations and single contractors signatory to separate contracts have manifested some common purpose to create or recognize a single multiemployer bargaining unit within their eleven-county Southern California territory. Any such contention—proffered in Respondent Union's behalf—must, for the present at least; be rejected.

4. The Purpose of the Challenged Clauses

a. *General Counsel's Position*

With this determination—that Respondent Union's master contract provisions herein really cover multiple bargaining units, which must be considered separable, within the Southern California building and construction trade—we confront General Counsel's contention that Article I, Paragraphs B-15 and B-16, compassed within cognate contracts for these separable bargaining entities, possess a secondary thrust.

Substantially, General Counsel suggests that these provisions cannot reasonably be considered purposed to protect contractually-mandated working conditions for covered employees within some single "bargaining unit" merely; more particularly, they cannot be considered "addressed to the labor relations of the contracting employer vis-a-vis his own employees" despite their presence within a contract which defines their wages, hours and conditions of work. See *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612, 645. Rather—so General Counsel contends—the challenged clauses within each of the numerous contracts must be considered "aimed really at the union's difference with another employer" [*Local No. 636, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, AFL-CIO v. N.L.R.B.*, 278 F.2d 858, 864 (C.A. D.C.)], since they provide methods whereby pressure may be brought, when required, upon the latter, with whom Respondent Union may have a primary dispute.

With these propositions constituting his major premise, General Counsel characterizes Respondent Union's presumptive concern with Urban Pacific's delinquent Trust Fund contributions as the so-called "primary" dispute he [sic]. Within his brief, then, he proceeds as follows:

> The [challenged] clauses specifically hold a [prime] contractor responsible for the delinquencies of a subcontractor, thereby discouraging the doing of business with the subcontractor . . . [The] language provides that the contractor may limit his liability under the agreement by terminating the subcontract. The subsections permit Respondent [Union], although engaged in a primary

> dispute over unpaid fringe benefits with a signatory subcontractor, to enmesh a neutral general contractor in the dispute, shift all liability to the latter, and, in effect, make it the guarantor of the subcontractor's obligations.

Thus, General Counsel notes, the contractual provisions now in question have enmeshed Five Contractors, characterized as neutral contractors herein; they have been treated as guarantors for Urban Pacific's Trust Fund liability, Respondent Union, so General Counsel contends, would have them penalized, thus, for having done business with Urban Pacific, despite their receipt of notice regarding that business entity's contribution delinquency. With these propositions for predicate, General Counsel suggests that the challenged contractual clauses have a secondary, statutorily-proscribed purpose and thrust.

b. *Discussion*

When proffered in these categorical terms, however, General Counsel's contentions—within my view—beg the basic question presented herein. In connection therewith, General Counsel has provided no persuasive rationale for his declaration that—regardless of circumstances—prime contractors, privy to Respondent Union's master contract, should be considered "neutral" parties with relation to controversies bottomed upon Trust Fund contribution delinquencies chargeable to their subcontractors. In regard to controversies premised upon such delinquencies, I am persuaded that prime contractors—whether privy to Respondent Union's Master Labor Agreement by virtue of their Contractors Association membership or their "Short Form" contract signatory status—cannot, reasonably, be thus regarded.

The provisions challenged herein, concededly, govern a definable, limited category of business relationships; they cover situations wherein prime contractors privy to Respondent Union's Master Labor Agreement have dealt, or propose to deal, with other signatory contractors, solely. With respect to situations described thus generally, however, several distinguishable variations remain conceivable. These include:—

1. Cases in which prime contractors, privy to Respondent Union's master contract through their Contractors Association membership, subcontract with other AGC, BIA, or EGCA members.

2. Cases wherein Contractors Association members subcontract with business enterprises singly privy to Respondent Union's Master Labor Agreement by virtue of their concurrent "Short Form" contracts, separately signed.

3. Cases in which prime contractors privy to separately signed "Short Form" labor agreements hold subcontracts with Contractors Association members.

4. Cases wherein "Short Form" contract signatories negotiate subcontracts with other business enterprises singly bound, likewise, through labor contracts with Respondent Union separately signed.

Regarding situations which would fall within the first category described, General Counsel herein—presumably—takes no discernable position; though he calls Article I, Paragraphs B-15 and B-16, generally "secondary in thrust" within his brief, their conceivable applicability with respect to business relationships between prime contractors and subcontractors jointly bound

thereby, through privity within a single "multiemployer" bargaining group, has not herein been considered.

> (The possibility that prime contractor-subcontractor relationships may be negotiated between business enterprises so situated cannot be gainsaid; the present record, however, reflects no such situation.)

General Counsel does, however, press his contention with respect to situations compassed within the second and fourth categories. I note, in this connection, that Griffith, Nicks, Security, and Zurn/V & L Construction have all been, throughout the period with which this case is concerned, contractually committed with respect to Respondent Union's Master Labor Agreement by virtue of their Contractors Association membership; Urban Pacific's subcontracts with these business enterprises, therefore, presumably fall within the second category. Sukut-Coulson's contractual commitment derives from its separately-signed "Short Form" contract; this prime contractor's several subcontracts, therefore, would seem to fall within the category last noted, since Urban Pacific's various business entities have been likewise, separate contract signatories. These particular prime contractor-subcontractor situations, then, provide the factual context with respect to which relevant determinations, herein, must be made.

Respondent Union's master contract, with respect to which these designated business enterprises are, jointly or severally, committed—purports to set standards governing wages, hours and working conditions for "operating engineers" hired by signatory contractors, throughout a defined Southern California territory. The AGC, BIA and EGCA contractor members privy there-

to, together with numerous "Short Form" contract signatories, comprise a multifarious group of business enterprises which—separately or conjointly—provide needed services within the building and construction trade. The various business enterprises noted have all been, throughout, bound equally to pay contract wages, and to provide funds for various contractually-specified fringe benefits through required Trust Fund contributions.

> (Respondent Union's contract—within Articles VIII, IX, X, and XI particularly—commits the contractors bound thereby "to abide by" the various Agreements and Declarations of Trust previously noted,—and to make monthly contributions of certain fixed sums "per straight time or overtime hours worked" by their workmen contractually covered. Counsel have stipulated, herein, that—throughout the period with which this case is concerned—the various prime contractors with whom we are concerned, Griffith, Nicks, Security, Zurn and Sukut-Coulson, have had on their respective worker payrolls, one or more members of Respondent Union, subject to their current collective-bargaining contract's terms.)

With matters in this posture, determination seems clearly warranted that these contractors—though their several commitments with respect to Trust Fund contributions may be set forth within discrete documents—necessarily share parallel concerns regarding their Trust Funds' financial integrity and functional capacity to provide—for their workmen—the contractually-mandated fringe benefits noted. Intervenor's witnesses have, substantially, so testified; I so find.

I note, further, that many building and construction industry workmen, characteristically, find repeated short-term employment with numerous "area" contractors throughout their respective work histories, since divers construction projects within a given territory are constantly being commenced and concluded, contractors are constantly transferring their business operations from one completed project site to another where new construction will be required, and construction crew complements must—consequentially—be changed, augmented or reduced, frequently, consistently with work requirements.

This being found, the creation of multiple Trust Funds with broadly defined industry-wide, area-wide jurisdiction, for the purpose of collecting contributions and disbursing contractually-mandated fringe benefits, clearly provides a practical method whereby covered employees with largely transient employment histories may be qualified for fringe benefits earned, regardless of the number of contractors for whom they may have worked. Such qualified employees will receive the same fringe benefits, which the Trust Funds disburse, regardless of whether they have worked for one or more contractors—and, likewise, without regard to whether their particular contractor employers may have been privy to Respondent Union's Master Labor Agreement by virtue of some Contractors Association membership, or by virtue of their status as separate "Short Form" contract signatories. Thus, the employees in question—like their contractor employers—share a common concern for the continued solvency, sufficiency and viability of those Trust Funds from which their health and welfare, pension and vacation-holiday pay

benefits derive. The record, within my view, warrants such a conclusion—and I so find.

Concurrently with their manifest determination to provide fringe benefits—through Trust Funds specially created—for which their "operating engineer" employees might qualify, the various employers concerned, whether bound to provide such benefits through a multiemployer contract or separately signed documents, have clearly committed themselves to programs and procedures designed to make sure that their Trust Funds remain adequately funded, with the capacity to protect and preserve their continuing solvency, and thereby to maintain their contractually-mandated programs. The financial integrity and functional capability of these funds, currently and hereafter, clearly depends, in significant measure, upon required contributions neither being evaded nor falling in arrears; delinquencies—should they be permitted to become long-continued or widespread—could adversely affect every employee working for contractors within the territory which the Master Labor Agreement covers. These "adverse effects" could touch every covered workman with a current or prospective fringe benefit claim, regardless of whether his claim had been, or would be, derived from work "credits" earned with some Contractors Association member, some "Short Form" signatory, or numerous contractors in both categories.

The hazard noted must be considered more than theoretical. Intervenor's detailed testimonial presentation herein—with respect to various Trust Fund operations, past, present and future—fully warrants a determination that sustained, unremedied delinquencies could seriously compromise their capacity to provide nego-

tiated fringe benefits for all contractually covered employees:—

1. With respect to Health and Welfare Fund operations particularly, the testimonial and documentary record will support a determination—which I make—that reduced collections can, significantly, hamper the trust's ability to provide a defined schedule of benefits, since the trust's reserves could be adversely affected. Within the recent past, developing financial stringencies have, in fact, forced the fund's trustees to borrow $2,000,000, change carriers, and drastically modify benefit plans; they have dictated the termination of some substantial medical benefits, and cost-cutting modifications with respect to plan administration and claim processing procedures. The fund's difficulties were—so credible testimony shows—partially caused, and certainly aggravated, by delinquent contractors whose contribution payments, required pursuant to collective-bargaining contracts, were not received. With a stepped-up payroll audit program and more strenuous collection efforts, the fund's benefits have been, most recently, improved.

2. The Operating Engineers Pension Trust program—which provides both normal, early and disability retirement pensions for covered workmen and death benefits for their beneficiaries—must necessarily, rest upon funds actually received and held for investment, plus whatever earned interest may be derived therefrom. Thus, the Trust's proclaimed uniform plan, with respect to retirement and death benefits claimable by qualified em-

ployees with all signatory employers, has been, and will be, directly affected, and conceivably diminished, through contribution delinquencies chargeable to particular signatory contractors. While a witness, Administrator Majich noted that collection failures "seriously affect" this Trust Fund's interest earnings. In this connection, further, Harley Blankenship, vice president of a firm of independent actuarial consultants which the Trust Funds retain, testified—without challenge or contradiction—that, with full collections and no delinquency problems, the trust could support measurably "improved" retirement and death benefit programs, for all qualified workmen.

3. The Vacation-Holiday Savings Trust, like its companion funds, deposits contributions received within a single interest-bearing "common pool" bank account, while the specific *sums* contributed for particular workmen are reported and credited within their personal records. Further, hours which particular employees may have worked, for which contributions have not been received—when proven to the trust's satisfaction—are recorded as so-called "unpaid hours" likewise within their personal records. The sums which have been received by this designated trust are distributed semi-yearly to various workmen for whom such contributions have been proffered. Employees who may have worked "unpaid hours" do not, however, receive vacation or holiday pay, computed with respect thereto, concurrently with the trust's regular semi-yearly distribution. Shortly thereafter, the workmen credited with such "unpaid hours" may apply for the payment of benefits based thereon. When pro-

vided with reasonable proof regarding their hours of work for which contributions were not paid, the fund's Board of Trustees will make "vacation-holiday" payments to the concerned workman, using funds which are derived from the interest earned—during the previous six months—on contributions paid by other contractors. Benefit payments covering "unpaid hours" will be made, normally, solely to the extent that such interest earnings have become available; the trust's administrative costs must, likewise, be paid from such interest earnings. Whenever a balance thereof remains undistributed, the trust distributes such left-over interest income to covered workmen, in the form of supplementary semi-yearly dividends. Recently, for several years—largely because a substantial number of proven "unpaid hours" have had to be funded—the Vacation-Holiday Savings Trust has been unable to distribute such supplementary dividends; payments were, however, resumed in December, 1972, and May, 1973, bottomed upon recent surpluses. The fund's experience has demonstrated, therefore, that—when the payment of benefits bottomed upon proven "unpaid hours" diminishes the total sum available within its interest earnings account, the remainder available for dividend payments to all qualified trust participants is correspondingly reduced.

4. The Southern California Operating Engineers Apprentice Training Trust funds and maintains a training program for apprentices within the operating engineers craft. Administrator Majich's credible testimony, proffered without challenge or con-

tradiction in this connection, warrants a determination—which I make—that, while such program expenditures in previous years have been kept within available fund limits, this trust has recently begun to experience current monthly deficits, largely because of heightened Federal and State educational requirements with respect to apprentice training. The fund's Board of Trustees currently believes that its currently required level of training activity cannot be sustained with the fund's present $.02 contribution rate. While a witness, Administrator Majich declared that higher contributions, contractually specified, would provide "one obvious solution" with respect to the fund's current deficit situation. Such a higher contribution rate for apprentice training purposes, however, would significantly affect the total "economic package" with respect to which Respondent Union and the various concerned Contractors Associations would be negotiating. The higher rate could, conceivably, dictate a commensurate increase with respect to the total package negotiated; of course, such a consequence would, *pro tanto,* raise every concerned contractor's business costs. Alternatively, such a contribution rate increase for apprentice training—within a total "economic package" negotiated with no coequal change—could claim a proportionately greater share thereof; this would necessarily, reduce the sums left available for higher direct wage payments, or further fringe benefits for concerned workmen.

With matters in this posture, there can be no doubt that the financial integrity and functional capability of these various Trust Funds does, to a significant

degree, depend upon required contributions neither falling in arrears nor being circumvented. Within his brief, Intervenor's counsel suggests, in this connection, that "the degree of effectiveness in collecting required contributions from delinquent contractors has a direct economic impact on the amount of 'common pool' funds available" for these various fringe benefit programs. That suggestion, within in my view, reflects a truism. Necessarily, therefore, widespread or long-sustained delinquencies—should they be permitted, or left standing without remedy—could, as previously noted, adversely affect every contractor's employee presumptively qualified to claim these contractually defined fringe benefits. Such workmen—whether qualified because of their work histories with Contractors Association members, with separate "Short Form" contract signatories, or with both at various times—would be equally disadvantaged.

Metaphorically speaking, these Trust Funds provide a fringe benefit "umbrella" which covers qualified workmen in *many* bargaining units. Whenever that umbrella's protective canopy is damaged, breached or constricted, *all* workmen nominally eligible for protection thereunder are *pro tanto* deprived of that protection—whether they earned their rights to claim it under contractual provisions within a master contract or short form document.

Of course, the primary responsibility to provide required Trust Fund contributions rests with those business enterprises which directly employ particular covered workmen. When such business enterprises satisfy their contractual obligations completely—whether they do so routinely, or following their receipt of notice regarding a claimed delinquency—nothing further can be required. The contractual provisions challenged here-

in, however, reasonably recognize that there may be contractors—most likely those with less working capital and less productive capacity—who may not be willing or ready to discharge their primary responsibilities in this connection. Article I, Paragraphs B-15 and B-16 provide that, when this occurs, neither the delinquent contractor's employees nor those employed by other non-delinquent contractors will suffer, because the prime contractor can be required to guarantee the removal of accrued delinquencies, and the continuation of contribution payments, whenever he has used, or continues to use, a delinquent subcontractor's services.

> (Less than five years ago, this Board noted concurrence with a Trial Examiner's decision that labor organizations could—*without violating the statute*—press a bargaining demand that contractors with whom they were negotiating should participate in, and contribute to, trust funds which had been created to service craft workers in several bargaining units beyond the particular, circumscribed unit which their negotiations concerned. *United Stats, Tile and Composition Roofers, Local No. 220*, 177 NLRB 632, 649-652, 76 LRRM 1016, 1019-1023. To hold, now, that employers privy to such a broad commitment cannot, legitimately, negotiate a further compact—between themselves and with the labor organization which represents their workmen—designed to preserve and protect their common trust fund's capacity to service its multi-unit beneficial constituency, would be, within my view, highly anomalous.)

However, General Counsel suggests that prime contractors should be considered neutral "secondary" firms,

under these circumstances, since—when they are called upon to fulfill "guarantor" commitments—the benefits flowing from their payment of some other firm's accrued delinquencies do not go to their own employees."If it [the payment] benefits anyone, it benefits the employees of the delinquent subcontractor." This contention, however, derives from a misconception. The record shows, clearly, that all contributions received by these Trust Funds are deposited in "common pool" accounts. Employees whose work histories include some service with delinquent subcontractors may, nevertheless, qualify for benefits from a particular fund's "common pool" by providing their entitlement to sufficient hourly work credits with contractors committed to make contributions—through their personal check stub records, monthly reports which their delinquent employer or different contributing employers may have submitted, or payroll audits which Trust Fund representatives may have made—whether or not contributions related hereto have been remitted. Thus, such contributions, when belatedly paid—whether by their own employer or some other firm which has retained their employer through a subcontract—merely benefit such employees to the same degree, and in the same way, that all other covered workmen are benefited, by promoting the solvency and functional soundness of the funds.

Under these circumstances, I conclude, despite General Counsel's contrary contention, that all "operating engineer" employees whose wages, hours and conditions of work are governed by Respondent Union's master contract—whether they work for prime contractors within a multiemployer bargaining unit or for separate "Short Form" contract signatories—share a direct eco-

nomic interest regarding the timeliness and completeness of those Trust Fund contributions with respect to which their contractor employers have been committed. Further, I conclude that Article I, Paragraphs B-15 and B-16, were specifically designed to protect and preserve these direct economic interests, within each separate "bargaining unit" with which we are concerned.

> (General Counsel's contrary contention—within the context with which we are now concerned—would create, if found persuasive, some highly anomalous situations. AGC, BIA and EGCA members *who subcontract with other members of their jointly-bound trade associations* could be held "guarantors" for their subcontractor's Trust Fund contributions. But such Contractors Association members who subcontract with, [a] members of some other trade associations privy to separately negotiated contracts with Respondent Union herein or [b] "Short Form" contract signers, could not be considered bound by the contractual provisions now in question. Confronted with such a legal situation, prime contractors holding AGC, BIA or EGCA membership could, conceivably, be *encouraged* to subcontract with delinquent firms privy to "Short Form" contracts or separately-negotiated multiemployer contracts, thus endangering the "economic integrity" of the several Trust Funds which service some of their own employees. This Board, within my view, cannot reasonably conclude that Congress—when it settled Section 8(e)'s present language—proposed to legislate this kind of double standard, with respect to "hot

cargo" clauses, within the building and construction trades.)

These disputed clauses "directly benefit" the workmen employed by contractors bound thereby. They protect the fringe benefits of such workmen, within each separately covered bargaining unit; they may, therefore, reasonably be considered "germane to the economic integrity" sought for those fringe benefit programs for which employees within these "work units" may qualify. Within his brief Intervenor's counsel notes, cogently, that:

> When Intervenors are successful or fail in the collection of payments owed by a delinquent employer, all covered employees are benefited or are damaged uniformly, regardless of whether they work for the particular employer and certainly without regard to whether they are employed by a member of an employer association or a "short form" contractor . . . Any loss of payments owed to the trusts by employers may rightly be of substantial concern and primary interest to employees and employers who are engaging in collective bargaining regarding the necessity, amount and collection of such payments to the trust. When Intervenors expend funds for the collection of delinquent amounts, or are ultimately unsuccessful in collecting delinquent contributions, the effect on each and every employee of the bargaining employer is an immediate and material drain upon the amounts paid to the trusts by reason of hours worked by each such employee.

Clearly, contractual provisions designed to forestall, remedy or meliorate such a direct, tangible economic consequence—as previously noted—promote a legiti-

mate "bargaining interest" which all covered "operating engineer" workmen, whether employed by prime contractors or subcontractors, share. Such provisions within my view, deserve recognition and validation, like those contractual "work preservation" and putative "union standards" clauses which this Board has, previously, found privileged.

Realistically, the challenged delinquency provisions herein do function as permissible "union standards" clauses. They provide a currently viable method whereby contractually-mandated fringe benefit programs may be protected and preserved, since: (1) They facilitate the termination of subcontracts with signatory contractors whose previously accrued or newly-generated contribution delinquencies could prejudice the maintenance of such programs; and, (2) they remove whatever economic motivation a prime contractor may have to negotiate or maintain subcontracts with delinquent employers, premised upon lower bids proffered by such delinquents, which have been facilitated by their failure or refusal to bear contractually-mandated fringe benefit costs. Within his brief, Intervenor's counsel notes persuasively—with record support—that:—

> . . . [It] must be recognized that the disputed clauses function as an important protection of the union standards and unit work of the employees of the general contractor. If the general contractors were allowed to utilize subcontractors who do not pay fringe benefits, obviously the subcontractor could bid the same work much more cheaply than the general contractor could do the work with his own operating engineer employees. Under such circumstances the general contractor would be highly motivated to subcontract all oper-

> ating engineer's work, to the detriment of his own operating engineers employees. In order to deter such conduct, the disputed clauses impose upon the general contractor all pre-existing delinquencies of a delinquent subcontractor. Without such a deterrent as liability for the added delinquencies, the unscrupulous general contractor would be encouraged to gamble with the use of delinquent subcontractors . . .

General Counsel suggests, however, that prime contractors are "penalized" when they are required to cover *previously accrued delinquencies* for newly retained subcontractors. I find the suggestion unpersuasive, for several reason . *First:* Respondent Union's master contract, with respec to which both the prime contractor and delinquent subcontractor are consensually committed, reflects their mutual agreement that prime contractors who make good their subcontractor's previously accrued delinquencies "shall withhold sufficient funds from monies due or to become due such subcontractor" for work previously performed or work in progress, satisfying their derivative Funds liability therefrom. This provision, substantially, reflects a general recognition, necessarily shared by all contractors privy thereto, that prime contractors, when called upon to make Trust Fund contributions for their subcontractors, may recoup payments made. *Secondly:* Those contributions which a prime contractor may be required to provide can never exceed his chosen subcontractors' total Trust Funds liability, or some *pro rata* share thereof. Thus, they can never be greater than the total cost burden, chargeable for fringe benefit programs specifically, which the subcontractor has failed or refused to satisfy. Such contribution payments, therefore, will necessarily "bear a reasonable relationship" to those differentials

in business costs, between contributing and non-contributing contractors, which enable the latter to underbid the former, competitively, when both are seeking subcontracts. See *International Union, United Mine Workers of America,* 188 NLRB No. 121, Slip Opinion, p. 4 in this connection. When one or more prime contractors are held liable for Trust Fund payments, their contributions—roughly speaking—merely "equalize the differences in [fringe benefit program] costs" between their chosen non-contributing subcontractor and the contributing firm with which they could have subcontracted.

Within this Board's most recent *United Mine Workers* decision just noted—wherein a determination was made that the labor organization's contractual "80-Cent" provision constitutes a so-called "union standards" clause, for reasons comparable with those herein discussed—the decisional rationale whereby such clauses have been sustained was summarized. The Board, therein, declared that:

> The validity of a union standards clause lies in the fact that it removes the economic incentive to subcontract unit work to employers maintaining substandard conditions of employment which enable such employers to perform the work at cheaper labor costs. By removal of the economic incentive, a union standards clause protects and preserves unit work precisely to the extent that the economic incentive to subcontracting is the compelling consideration. Under any union standards clause, the signatory employer is not restrained from subcontracting work to employers in another bargaining unit covered by similar wage contractual provisions. Such subcontracts may of course be made for other than economic reasons; however,

> the fact that such subcontracting is permitted does not detract from the fact that the object of such clause is to preserve and protect unit work. This was as true of the [Protective Wage Clause] as it is of the 80-cent clause. Accordingly, we find that the existence of a multiplicity of bargaining units does not preclude the 80-cent clause from functioning as a union standards clause as it was intended to do.

Parallel reasoning, within my view, dictates validation with respect to the challenged "delinquency" provisions herein. These provisions, likewise, remove a prime contractor's economic motivation to subcontract his unit work with other contractors,—whether within his bargaining unit or separately committed—who, despite their parallel commitment to maintain regular Trust Fund contribution payments, have defaulted with respect to that commitment and thereby have made possible their performance of such work with "cheaper" labor costs. By removing the prime contractor's economic motivation, the provisions challenged herein serve two primary purposes. *FIRST:* They protect and preserve work—either for the prime contractor's employees or for employees of some contributing contractor seeking a subcontract—precisely to the extent that the prime contractor's economic motivation for subcontracting may have been his compelling consideration. *Secondly:* They protect and preserve the financial integrity and functional capability of fringe benefit programs contractually-mandated for the prime contractor's employees, which programs could, conceivably, be prejudiced should such prime contractors find themselves free to subcontract with delinquent firms, without restriction. The contractors governed by these consensual limitations have not been

restrained from subcontracting work with business entities within some separate bargaining unit, which are, likewise, committed to make Trust Fund contributions, and reciprocally committed to forswear dealing with delinquent contributors or make good their delinquencies, should such business entities become prime contractors. Rather, signatory contractors—pursuant to these clauses—have accepted contractual restraints and contingent liabilities, which concededly define and/or limit their subcontract rights, primarily to protect and preserve negotiated fringe benefit programs for their respective "bargaining unit" workmen. Since the provisions challenged herein serve the primary purpose noted, within each separate "bargaining unit" with respect to which their applicability has been stipulated, they must be considered permissible "union standards" clauses; I so find.

Whatever secondary consequences compliance with such provisions might generate—when a prime contractor proceeding consistently therewith ceases doing business with a delinquent subcontractor—should be considered, within my view, purely incidental; such secondary results cannot, reasonably, be considered sufficiently significant to detract from the provisions' lawful primary purpose.

5. Purported Secondary Boycott Threats

General Counsel's charge herein, with respect to Respondent Union's purported Section (b)(4)(ii)(B) violation, derives entirely from Respondent Union's supposed effort coercively to implement the contractual provisions which have, herein, been considered. Since I have, however, found that these provisions serve a statutorily permissible primary purpose, conduct con-

sistent therewith—purportedly chargeable to Respondent Union herein—would, necessarily, have a primary rather than secondary thrust. Such conduct would, therefore, merit characterization as lawful. With the provisions challenged herein found primary, and with conduct consistent therewith found lawful, no further consideration need be given Respondent Union's secondary claim that it should not—in any event—be held responsible for particular conduct directly chargeable to Trust Funds Administrator Majich and counsel, undertaken purportedly in Respondent Union's behalf.

(Should the Board, however, disagree with my basic determination herein, some "side" comments regarding the question of the Trust Funds' putative agency status—particularly within the specific context with which this case is concerned—may be warranted. General Counsel contends that the four Trust Funds with which we are concerned—or, rather, their several Boards of Trustees considered as a group—function generally as surrogates for the parties designating them, who likewise control their continued tenure. See *Local 80, Sheet Metal Workers International Association, AFL-CIO, et al (Turner-Brooks, Inc.)*, 161 NLRB 229, 233-234; *Local 138, International Union of Operating Engineers, AFL-CIO, (J. J. Hagerty, Inc.)*, 139 NLRB 633, 637, TXD pp. 651-652, enf'd 321 F.2d 130, 137 (C.A. 2, 1963), 53 LRRM 2754, 2759-2760; cf. *Local 140, Bedding, Curtain & Drapery Workers Union (The Englander Company)*, 109 NLRB 326, 329, TXD pp. 342; *Raymond O. Lewis, et al*, 144 NLRB 228, 232. However, such a conclusion—particularly with reference to the situation with which we are presently

concerned—might well be considered unreasonably simplistic. When reviewing the status of bipartite boards of trustees, this Board has several times held that their trustee members, whether designated by concerned employers or labor organizations privy to some trust fund's formation, function as statutory "agents" with respect to both principals. In this case, however, we are dealing, realistically, with agents of the Southern California Benefits Administration, Inc., more particularly the Trust Funds Administrator, together with that corporation's retained counsel; clearly, they have been, and remain, subject to direction by Boards of Trustees which must, necessarily, function pursuant to jointly-reached decisions, though their members, separately considered, may be responsible to different principals. A determination, therefore, that Majich and his counsel—when they discharge their delegated responsibilities with respect to the collection of delinquent contributions—function as surrogates for a single principal representing their funds' beneficiaries, solely, rather than for both their settlors and beneficiaries, could be considered somewhat strained. See *American Law Institute, Restatement of the Law, Second: Agency 2d*, §1, Comment (b), pp. 8-9; §13, Comments (a)-(c), pp. 58-59; §14 B, Comments (a)-(c), (f), pp. 62-64; §14 L (1), Comment (a), pp. 76-77. See, further, Seavey, *Studies in Agency*, "The Rationale of Agency—the Relationship," pp. 75-76; 54 *Am. Jur.* 100, "Trusts" §114. Compare: John S. Welch and Hugh S. Wilson, "Applying Traditional Principles of Trust Law to Union and Management Representatives Ad-

ministering Taft-Hartley Trusts," *Trust and Estates,* Vol. 111, No. 12 (December, 1972), pp. 954 ff., in this connection. Further, it should be noted that we are concerned, herein, with fund spokesmen who have been dealing with a defined group of contractors compassed within a larger group constituting their trustors or settlors. Certainly, this Board could, arguably, determine—under these special circumstances—that Trust Funds Administrator Majich and retained counsel were representives, and functioning on behalf of, both trustee groups; that they were discharging a fiduciary duty or responsibility laid upon them by concededly bipartite Boards of Trustees, rather than pursuing some special objective singlemindedly dictated solely by one of their ultimate principals, and calculated to work toward a co-principal's disadvantage. The Board could, in short, conclude, reasonably, that—when Trust Funds spokesmen seek to protect the solvency, integrity and functional capacity of their funds—they do so, not on behalf of their Trust's multiple beneficiaries solely, but likewise for the benefit of their Trust's composite group of settlors. And the fact that their course of conduct may, *inter alia* find them telling a contractor [settlor] that his continued failure or refusal to remit contributions *—which he is contractually committed to make, either for his own workers or for those of his delinquent subcontractor*—might ultimately subject him to so-called "job action" by representatives of his covered employees [beneficiaries] should not, therefore, dictate a determination that such Trust Funds representatives have been functioning

beyond the proper scope of their fiduciary responsibilities.)

Further, with Section 8(e)'s generally proscriptive language found inapplicable herein, no present determination need be made regarding the applicability or non-applicability of the designated section's construction jobsite proviso. I shall recommend, therefore, that the present complaint be dismissed.

CONCLUSIONS OF LAW

In the light of the foregoing findings of fact, and upon the entire record in this case, I make the following conclusions of law:

1. The contractor members of AGC, BIA, EGCA, Sukut-Coulson, and the various business entities collectively designated as Urban Pacific herein, are employers within the meaning of Section 2(2) of the Act, engaged in business activities which affect commerce, within the meaning of Section 2(6) and (7) of the Act, as amended.

2. International Union of Operating Engineers, Local Union No. 12, is a labor organization within the meaning of Section 2(5) of the Act, as amended.

3. Respondent Union has not, as alleged in the complaint, engaged in unfair labor practices proscribed by Section 8(e) or Section 8(b)(4)(ii)(B) of the Act, as amended.

* * *

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Rela-

tions Act, I hereby issue the following recommended order.[1]

ORDER

It is hereby ordered that the complaint herein be, and it hereby is, dismissed in its entirely.

Dated: September 17, 1973.

/s/ Maurice M. Miller
Maurice M. Miller
Administrative Law Judge

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[1]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board, and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX D.

Order Correcting Decision and Order.

United States of America, Before the National Labor Relations Board.

International Union of Operating Engineers, Local Union No. 12 and Griffith Company; J. W. Nicks Construction Co.; Security Paving Co., Inc.; Sukut-Coulson Inc.; and V & L Construction Co., Inc. Case 21-CC-1451.

International Union of Operating Engineers, Local Union No. 12 and Griffith Company; J. W. Nicks Construction Co.; Security Paving Co., Inc.; and Sukut-Coulson, Inc. and Associated General Contractors of California, Inc.; Building Industry Association of California, Inc., and Engineering and Grading Contractors Association, Inc. Parties to the Contract. Case 21-CE-126.

On June 28, 1974, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1] to which an inadvertent error appears.

IT IS HEREBY ORDERED that said Decision and Order be, and it hereby is, corrected by striking the words "Union Pacific" and substituting therefor "Urban Pacific" wherever it appears on lines 18, 19, 22 and 25 on page 2, lines 2 and 6 on page 3; and line 12 on page 6.

IT IS FURTHER ORDERED that the Decision and Order, as printed shall appear as hereby corrected.

Dated, Washington, D. C., October 21, 1974.

By direction of the Board;

George A. Leet
Associate Executive Secretary

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[1]212 NLRB No. 4, Chairman Miller and Member Kennedy dissenting.

APPENDIX E.

Decision and Order.

United States of America, Before the National Labor Relations Board.

Joint Council of Teamsters No. 42, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Merle Riphagen. Case 21-CC-1424.

Joint Council of Teamsters No. 42, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Merle Riphagen and Associated General Contractors of California, Inc.; Building Industry Association of California, Inc.; and Engineering and Grading Contractors Association, Inc. Parties to the Contract. Case 21-CE-122.

On May 31, 1973, Administrative Law Judge Louis S. Penfield issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions, as modified herein, of the Administrative Law Judge and to adopt his recommended Order.

We agree with the Administrative Law Judge, but for different reasons, that the Respondent Union did not violate Section 8(e) and 8(b)(4)(ii)(A) and (B) of the Act by entering into and enforcing agreements with various employer associations and individual contractors whereby the general contractors obligated themselves to be financially responsible for the delin-

quencies of their subcontractors in the event the latter failed to make contractually required payments to the Union's trust funds.

As noted by the Administrative Law Judge, the alleged unlawful clauses in the instant case are substantially similar, if not identical, to those considered by the Board in *General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Associated Independent Owner-Operators, Inc.)*, 181 NLRB 515. There the Board held that, in the absence of sufficient extrinsic evidence as to the manner in which the union enforced such clauses, the Board would make no determination as to the legality of the clauses or the union's conduct in relation thereto. The General Counsel has produced evidence in this case that the Union exerted pressure against La Mirada Trucking Company, a member of the Engineering Contractors Association, to assume financial responsibility for the delinquencies of Merle Riphagen, its subcontractor. The facts with respect to the operations of La Mirada; its president, Charles W. Poss; and C. W. Poss, Inc., a sister corporation, of which Poss is also president, were sparsely litigated. The record reveals that La Mirada is a "broker" for small independent truckers, such as Riphagen, and that the latter's several trucks with drivers are employed by La Mirada on an hourly basis to haul dirt for various contractors in the Los Angeles basin area. La Mirada does not own any trucks or employ any employees. It operates merely as an intermediary between contractors needing trucks and drivers and owners of trucks who need employment. There is some

evidence that Poss or a supervisory employee of C. W. Poss, Inc., supervises the loading of Riphagen's trucks at the borrow pit from which the dirt is to be hauled and occasionally visits the jobsites where the dirt is deposited. Riphagen testified that a "foreman" of La Mirada or C. W. Poss, Inc., had the demand slips at the borrow pit to keep a record of the time the trucks were loaded and reloaded. La Mirada operates a dispatch system to direct and control the operation of Riphagen's trucks when employed by La Mirada.

To establish a violation of the secondary boycott provisions of the Act the burden was on the General Counsel to prove by a preponderance of the evidence that Respondent Union restrained or coerced a secondary or neutral person to cease doing business with another independent person. This record, in our opinion, is insufficient to warrant the conclusion that La Mirada, Poss, or C. W. Poss, Inc., was a neutral or uninvolved person with respect to the operations of Merle Riphagen. The evidence suggests rather that Poss and his corporations were engaged in a joint business venture with Riphagen, to the extent the latter was utilized by Poss, to supply trucks and drivers for the hauling of dirt where such services were required by other contractors.

Accordingly, without passing upon the Administrative Law Judge's different rationale, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended

Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C., June 28, 1974

John H. Fanning,
Member

John A. Penello,
Member

NATIONAL LABOR
RELATIONS BOARD

[Seal]

MEMBER JENKINS, concurring:

I concur with Members Fanning and Penello in dismissing the 8(b)(4)(ii)(A) and (B) and 8(e) allegations in these cases on the grounds that the fringe benefit provisions constitute permissible work standards clauses. Contrary to them, however, for the reasons set forth in my dissent in *Raymond O. Lewis (Arthur J. Galligan)*, 148 NLRB 249, and my concurrence in *International Union of Operating Engineers, Local Union No. 12 (Griffith Company)*, 212 NLRB No. 4, I would adopt the Administrative Law Judge's determination that in this case, with respect to the fringe benefit fund clauses, the principal work unit is comprised of all employees employed by association members and individual signatories to the Master Agreement in the classifications provided in the contract.

Dated, Washington, D.C., June 28, 1974

Howard Jenkins, Jr.,
Member

NATIONAL LABOR
RELATIONS BOARD

CHAIRMAN MILLER AND MEMBER KENNEDY, dissenting:

The reader of this Decision will better appreciate our dissent in this case if we first set forth a description of the posture in which the majority's gossamer opinion would leave this case. We do not agree with the majority that La Mirada was not a neutral person within the meaning of Section 8(b)(4)(ii)(A) and (B) and Section 8(e) of the Act. Unlike them, therefore, we must pass on the Administrative Law Judge's different rationale for dismissing the complaint.

Our consideration and rejection of both the majority's and the Administrative Law Judge's rationale are explicated below. Moreover, the fringe benefit provisions of the contract which the Respondent Union applied to La Mirada here are, for all material purposes, identical to those similarly invoked by the charged union in our companion decision, issued today, in *International Union of Operating Engineers, Local Union No. 12 (Griffith Company)*, 212 NLRB No. 4.[1] For the

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[1]In *Griffith* the contract language in issue is the following:

Article I, Paragraph B-15. The Trustee of the Trust Funds, through their Administrator, shall furnish each Contractors Association and the Union, with a list of delinquent Contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquent list until such Contractor has paid all delinquent monies to the various Trust Funds.

(a) Any disputes between the parties concerning the payment or nonpayment of monies due the Trust Fund are not subject to Article V [Procedure for Settlement of Grievances and Disputes] of the Agreement.

16. In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums over to

purpose of decisional economy, and because this case sheds additional light on the object of such clauses, we have integrated our dissent in the *Griffith* case into our opinion here.

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the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Contractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date of the delinquency list on which the Subcontractor's name first appeared. The Contractor shall terminate the contract of the Subcontractor who fails to properly correct his delinquency.

(a) Where the Contractor fails or refuses to make payments required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor.

In the instant case the contested language is the following:

102.4.2 The 10th calendar day after such notice is sent by the administrative office, the general contractor shall become financially responsible for all delinquent fringe benefit payments that accrued on his job after the ten-calendar-day-notice period for payments owed by any subcontractor. The contractor may terminate the subcontract of said delinquent subcontractor, or subcontractors, thereby limiting his liability, on that job, to the period from the 11th day after such notice is sent by the administrative office to the termination of such contract on that job.

102.4.3 Where a contractor contracts with a listed delinquent subcontractor, or subcontractors, the contractor may terminate the subcontract of such delinquent subcontractor, or subcontractors, thereby limiting the contractors liability, on that job, to the period from the commencement of the work under the subcontract to the date of termination of that subcontract.

102.4.4 The union may give written notice to a listed delinquent contractor, or subcontractor, (with a copy to the general contractor) to pay the delinquent amount due all trust funds. Within five days from the giving of such notice, the union shall withhold service from any or all jobs of such delinquent contractors, or subcontractors, if proper payment is not made.

102.4.5 Where the general contractor fails or refuses to make payments required under the above provisions, the union shall have the right to withhold service from any or all jobs of such general contractor.

Contrary to the majority, we find that the Respondent Union has entered into and applied the fringe benefit provisions of the contract to La Mirada in violation of Section 8(b)(4)(ii)(A) and (B) and Section 8(e) of the Act.[2] For the reasons set forth below,

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[2]Three issues which the Administrative Law Judge and, of course, the majority find it unnecessary to pass on are (a) whether the demand for $11,000 supported by the Union's contractual right was coercion proscribed by Sec. 8(b)(4); (b) whether the administrator is an agent of the Union thereby inculpating the latter for its coercive conduct; and (c) whether the 8(e) jobsite proviso has any application to this case.

First, there would seem little room for doubt that the $11,000 demand was coercive. These interrelated fringe benefit clauses of the Master Agreement not only authorize the imposition of monetary liability, but also sanction a union strike to enforce that liability. Poss, owner of La Mirada, was cognizant that La Mirada would be struck if he failed either to pay or cancel Riphagen's contract. Realistically, La Mirada had no alternative but to cease doing business with Riphagen. We find that the administrator's demand on La Mirada constituted an unlawful coercive threat proscribed by Sec. 8(b)(4)(ii)(B). *Ets-Hokin Corporation,* 154 NLRB 839, enfd. 405 F.2d 159 (C.A. 9, 1968), cert. denied 395 U.S. 921. See also Member Kennedy's dissenting opinions in *Southern California Pipe Trades District Council No. 16 of the United Association (Associated General Contractors of California, Inc.),* 207 NLRB No. 58, and *Southern California Pipe Trades District Council No. 16 (Kimstock Division, Tridair Industries, Inc.),* 207 NLRB No. 59.

Chairman Miller, who did not join Member Kennedy's dissent in the *California* cases cited in the preceding sentence, nevertheless believes the circumstances of this case to be quite different. Assessing an employer with an amount of delinquency liability over which he has had no control, is, in the Chairman's view, quite different from the above cases in which the parties had agreed upon a fair means of determining reasonable compensation for a breach of agreement which was within the parties' control.

Secondly, the trust fund administrator is clearly an agent of Respondent Union. The administrator is hired by the board of trustees of the respective funds. Those boards are composed of an equal number of employer and union appointees who serve at the absolute pleasure of the appointing authorities. The power of the funds, through the administrator, to impose and demand payment of delinquent contributions is delineated in the Master Agreement itself, along with the Union's right

we firmly believe that the Board's decisions here and in *Griffith* come dangerously close to eradicating the secondary boycott proscriptions of the Act.

The fallacy of the Administrative Law Judge's basis for dismissal of the complaint here in *Riphagen,* with which Member Jenkins agrees, needs only brief analysis. The Administrative Law Judge concluded that the principal work unit here is comprised of all employees who work for association members or individual "Short Form" signatories to the Master Agreement. However, there is no evidence that the short-form employers have ever bargained in the multiemployer unit. Lacking that history, the short-form employers' adoption of the association-negotiated Master Agreement does not suffice to include them in the multiemployer unit,[3] and does not establish an industrywide bargaining unit.[4] Indeed, on this point Members Fanning and Penello are in complete agreement, as evidenced by their opinion in *Griffith.* Clear Board precedent establishes that La Mirada (the coerced contractor) and Merle Rip-

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to strike for failure to comply with the demand. Board precedent clearly holds that the trustees, and their administrators, are agents of the employer associations and the Respondent Union. *J. J. Hagerty, Inc.,* 139 NLRB 633, 637.

Finally, the jobsite proviso to Sec. 8(e) is inapplicable here. The Board has previously held that these identical contract provisions are unlawful self-help clauses proscribed by *Ets-Hokin, supra, General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, IBT (Associated Independent Owner-Operators, Inc.),* 181 NLRB 515.

[3]*Moveable Partitions, Inc.,* 175 NLRB 915. See also *International Photographers of the Motion Picture Industries, Local 659 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (MPO-TV of California, Inc. Y-A Productions, Inc.),* 197 NLRB No. 134, enfd. 477 F.2d 450 (C.A.D.C., 1973), cert. denied 414 U.S. 1157 (Jan. 21, 1974).

[4]*Raymond O. Lewis, et al. (Arthur J. Galligan),* 148 NLRB 249.

hagen (the primary party) are not part of the same bargaining unit, industrywide or otherwise, but rather comprise separate bargaining and work units.

Hence the basic issue, both here and in *Griffith*, is whether La Mirada and the offended contractors in *Griffith* are secondary persons to the Unions' dispute with their subcontractors. The Supreme Court's oft-quoted statement of the principles determinative of whether activity is "secondary," set forth in *National Woodwork*,[5] holds union conduct to be secondary where:

> . . . the tactical object of the agreement and its maintenance is [the boycotted] employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees.[6]

As the Supreme Court also said in this case, Section 8(e) and Section 8(b)(4)(A) were enacted by Congress primarily to close the loopholes in Section 8(b)(4)(B) (formerly 8(b)(4)(A)), and were not intended to alter the previously determined definition of secondary boycott set forth in prior decisions of the Supreme Court. One such decision, together with subsequent Board decisions concerning the same species of contractual arrangements in issue here, requires a conclusion that La Mirada and the offended contractors

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[5]*National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967).

[6]*Ibid.* at 645.

in *Griffith* are secondary parties. That case is ***N.L.R.B. v. Denver Building and Construction Trades Council,*** 341 U.S. 675 (1951), wherein the Supreme Court faced a situation where a general contractor for the construction of a commercial building awarded a subcontract for electrical work to a nonunion employer. The union picketed the entire job and thereby effectively forced the general contractor to terminate the electrical's contract. The Court explicated two principles material to the case at hand. The first was that the union could attain its ultimate purpose only by forcing the general contractor to terminate its contract with the electrical subcontractor. Therefore, it was scarcely open to question that *an* object of the strike, if not the only one, was to force the general contractor to cease doing business with the electrical contractor, and therefore the strike violated Section 8(b)(4)(A).[7] Secondly, the Court explicitly held:

> We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or *make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law*

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[7]Now Sec. 8(b)(4)(B). Thus, Sec. 8(b)(4)(A) was violated where *an* object of the union's conduct was to force a cessation of business, despite the fact that the ultimate purpose of the unions was to have union working standards observed on the project. *Bangor Building Trades Council, AFL-CIO (Davison Construction Company, Inc.)*, 123 NLRB 484, enfd. 278 F.2d 287 (C.A. 1, 1960).

to be overridden without clear Language doing so.[8] [Emphasis supplied.]

Having proceeded this far, something should be said about the majority's "joint business venture" opinion in *Riphagen* herein. Even conceding them their reading of the record,[9] they have failed utterly to supply any legally sufficient nexus in logic or philosophy between their statement on the one hand that La Mirada and Riphagen were engaged in a "joint business venture," and their statement that "this record . . . is insufficient to warrant the conclusion that La Mirada . . . was a neutral or uninvolved person with respect to the operations of Merle Riphagen." This is an inartful exercise in semantics. We recall no case, nor does the majority cite one, where the offended person was not in some way "involved" with the "operations" of the primary person whether it was by virtue of the sale of a product, or by ownership of the construction site, or by purchase of services, particularly by subcontract. Indeed, the majority's analysis would hold that the general contractor and its electrical subcontractor in *Denver Building Trades* were "involved" in the "operations" of each other, that they were therefore

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[8]*Denver Building Trades, supra,* 689-690. The Court reaffirmed this principle in *N.L.R.B. v. Local 825, International Union of Operating Engineers, AFL-CIO,* 400 U.S. 297 (1971).

[9]A concession which we do not make. La Mirada operates by first contracting with either a jobsite contractor who needs fill, or by contracting with a "borrow pit" owner who has sold his fill and needs to have it transported. Riphagen has no part of this facet of the business. And, on the other hand, La Mirada has no control over Riphagen's trucks or his employees.

We also fail to see what C. W. Poss, Inc., has to do with this case, since it was neither named in the complaint nor shown to have been involved in the events herein.

a "joint business venture,"[10] and that the Supreme Court necessarily erred in holding the general contractor to nevertheless be a neutral and unoffending person *vis-a-vis the labor relations* of the electrical subcontractor.[11] But the Supreme Court has already ruled that the facts *that the contractor and subcontractor are engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work,* do not eliminate the status of each as an independent contractor or *make the employees of one the employees of the other. Denver Building Trades, supra.*

During the years since enactment of Section 8(b)(4)(A), the Board has followed these principles in cases too numerous to warrant citation,[12] and particu-

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[10]The majority fails to say what they intend by the phrase "joint business venture." To the extent that they construe it to mean that La Mirada and Riphagen are to some degree engaged in the same enterprise, then they also must include the "borrow pit" owner, the construction site owner and his general construction contractor, and presumably the State of California or its subdivisions which built the highways used by Riphagen's trucks.

[11]The majority does not contend that La Mirada and Riphagen are not independent contractors. The complaint alleges, and the answer admits, that La Mirada (as a number of EGCA) and Riphagen each is, and has been at all times material herein, a person engaged in commerce within the meaning of Sec. 8(b)(4)(ii)(A) and (B) and Sec. 8(e) of the Act.

Clearly the General Counsel has met his burden of proving that La Mirada is a *prima facie* neutral and unoffending person *vis-a-vis* the employees and labor relations of Riphagen. In *Griffith*, the majority finds that *prima facie* showing rebutted, a matter dealt with later herein.

Furthermore, the analysis of the majority does not deal with at least half or more of the delinquencies the Union seeks to exact from La Mirada, since even in 1972 Riphagen performed no more than 55 percent of his work for La Mirada.

[12]See, e.g., *Metal Polishers, Buffers, Platers and Helpers International Union, A.F. of L.*, 86 NLRB 1243.

larly with respect to the maintenance of agreements just such as are in issue here. In *Calhoun Drywall,*[13] the general contractor was a party to a collective-bargaining agreement containing guarantee fringe benefit clauses which the Board found in *Barker*[14] (wherein the Board previously considered on a *per se* basis the type of clauses presented here) to be essentially identical to the clauses contested here. In *Calhoun,* the general contractor (Oberman) subcontracted drywall work to a nonunion contractor (Calhoun) whereupon the union enforced the fringe benefit guarantee provisions against the general contractor. The union contended, as Respondent Union does here, that the clauses were work standards provisions and therefore primary. The Board rejected this defense, finding that the union's conduct was unlawfully aimed at aiding union members generally. Moreover, the Board said, since the nonunion subcontractor had no employees subject to the collective-bargaining agreement, the fringe benefit funds could not have used the general contractor's payments on behalf of the subcontractor to benefit the latter's employees, and such payments would have been a penalty imposed on the general contractor for failing to subcontract to a union subcontractor. The Board stated:

> It is therefore apparent that if the Respondent's conduct were to be held lawful, it would have to be on the theory that it was designed to protect wages and job opportunities of Oberman's

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[13]*Orange Belt District Council of Painters No. 48, AFL-CIO (Calhoun Drywall Company),* 153 NLRB 1196, enfd. 365 F.2d 540 (C.A.D.C., 1966).

[14]*General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, IBT (Associated Independent Owner-Operators, Inc.),* 181 NLRB 515.

> employees, represented by the Respondent Painters, who were engaged in work similar to that done by Calhoun; i.e., drywall construction work. These employees would constitute the "principal work unit." But Oberman employed no painters or tapers or any other employees engaged in drywall construction work on this project: and at no time did Oberman have a contract with the Respondent Painters.[15]

Furthermore, in *Los Angeles Building & Construction Trades Council, et al. (Portofino Marina)*, 150 NLRB 1590, the Board found that the respondent unions were engaged in a primary labor dispute with the subcontractor over the latter's alleged delinquent welfare payments, and that by picketing the general contractor, rather than the subcontractor, the unions violated the *Moore Dry Dock*[16] standards and thereby violated Section 8(b)(4)(i) and (ii)(B) of the Act. The necessary predicate for the Board's conclusion was that the general contractor was not a primary party to the dispute, and the unions were illegally forcing the general contractor to remedy the subcontractor's delinquency. And recently, in *Local 272, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Miller & Solomon Construction Corp.)*, 195 NLRB 1063, the Board found unlawful picketing of a general contractor, who had no contract with the picketing union, with an object of forcing the general contractor to make good a defaulting subcontractor's debt ($26.26) to the union's pension and welfare funds. The Board held that the general con-

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[15]153 NLRB at 1201.

[16]*Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547.

tractor was a neutral party, not otherwise concerned with the dispute between the union and the defaulting subcontractor.

Turning now to the case at hand, we find that La Mirada, the prime contractor, and Riphagen, the subcontractor, are independent contractors and were doing business within the meaning of the Act.[17] Riphagen is merely a "Short Form" signatory to the Master Agreement and, by virtue of established Board law, each constitutes a separate and distinct bargaining and work unit.[18] It is clear that *an* object of the Union's conduct here was to force La Mirada to cease doing business with Riphagen, inasmuch as that is the action required, and indeed realistically expected, of La Mirada as the only alternative to La Mirada's payment of the $11,000 delinquency allegedly due from Riphagen.[19] On this basis it is apparent that a violation of the secondary boycott sections of our Act has been made out, unless it can be shown that La Mirada's employees' interest in preserving their work or work standards is directly affected by Riphagen's fringe benefit payment delinquencies. Such is the Respondent's defense here, which relies essentially for legal support on the rationale of *Dixie Mining Company*, 188 NLRB 753. The majority also relies on *Dixie Mining* (although they do not cite it specifically), as did the Administrative Law Judge, for their decision dismissing the complaint in *Griffith*. We disagree on two grounds.

The first, which in our view disposes of the instant case concerning Riphagen, is that *Dixie Mining* has

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[17]*Denver Building Trades, supra.*

[18]*Moveable Partitions, Inc., supra; Calhoun Dry Wall, supra.*

[19]*Denver Building Trades, supra.*

no applicability to the instant case for the simple, but controlling, fact that La Mirada retains no employees subject to the Master Agreement performing any work covered by its fringe benefit clauses.

The Board recognized this distinction as controlling long ago in *Local 47, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, et al, (Texas Industries, Inc.)*, 112 NLRB 923, enfd. 234 F.2d 296 (C.A. 5, 1956). There the Board held that the coerced general contractors clearly were secondaries to the unions' wage dispute with the subcontractors, since the former had only one part-time employee each represented by the unions, as to whom the general contractors had agreed to the wage demands. Rather, the Board held, the unions' concern was with the wages of the subcontractors, and therefore the dispute was not over the conditions of employment of the general contractors' employees or the subcontracting of those employees' jobs, and thus the general contractors were secondary persons. Thus the instant case stands on the same footing as *Miller and Solomon* and *Calhoun Drywall* where the pressured employers clearly had no interest in or control over the work sought to be preserved and maintained by the union's conduct. The mere fact that La Mirada has signed a short-form adoption of the Master Agreement in this case is of no importance, since without employees in the covered work classifications that agreement is essentially lifeless. The lack of employees subject to the Respondent Union's jurisdiction clearly eliminates any legitimate interest Respondent Union might have as to who La Mirada does business with, since, as in *Calhoun*, the only principal work unit for which the Union could have

an interest in maintaining work standards demonstrably does not exist. Under controlling precedent, La Mirada is a neutral independent contractor which has no interest in and no right of control over the labor relations between the Respondent and Riphagen. *Denver Building Trades supra; George Koch Sons, Inc.*, 201 NLRB No. 7.

Secondly, assuming *arguendo* that La Mirada employed employees who were covered by La Mirada's contract with the Respondent Union, and thus warranted consideration on the same plane as the pressured contractors in the accompanying *Griffith* case, our view is that the *Dixie Mining* decision is clearly distinguishable. In the present cases, the Unions have applied these fringe benefit guarantee clauses in order to reach jobsites, employers, and work units, so distant in time, distance, and contractual relationship from the pressured contractors, that the Unions' application of the contract to them embroils the contractors in labor disputes unknown to them, and so far removed from them that the contract cannot be construed as protecting the work preservation interest of the coerced contractors' employees.

In *Griffith* the Administrative Law Judge concluded that these contract provisions serve the primary purpose of preserving unit work standards by discouraging subcontracting to persons who supposedly perform covered work more cheaply by virtue of their reduced labor cost[20] resultant from failure to pay fringe benefit

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[20]There does not appear to be any evidence, either here or in *Griffith*, that this is in fact so.

contributions.[21] This, the Administrative Law Judge reasoned, was the rationale of *Dixie Mining*.

In *Dixie Mining*,[22] however, the Board was confronted with the application of a labor contract which required that each signatory employer which purchased nonunion coal pay 80 cents per ton into the union welfare fund on coal which the normal 40-cent-per-ton royalty rate had not been paid. The Board found that the evidence established that wage, fringe, and working standards of employees in nonsignatory mines were generally lower than those established in the National Bituminous Wage Agreement and that the 80-cent payment to which signatories were obligated on nonsignatory coal purchases bore a reasonable relationship to the wage and fringe benefits differential between signatory and nonsignatory operators. Accordingly, the Board held that the purpose of the 80-cent clause was to remove the economic incentive a signatory might have to buy coal produced by substandard labor.

The distinction between *Dixie Mining* and the present cases is manifest. In *Dixie Mining* the signatory coal operator was required to make the 80-cent payment only on the coal which *it* purchased from a coal producer using substandard labor, but in the instant

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[21]Contrary to the Administrative Law Judge, we see no relevance in the fact that the prime contractors may recoup their payments from their subcontractors. The issue here is whether the Union may lawfully coerce the prime contractors into making these payments in the first instance.

[22]Chairman Miller dissented in *Dixie Mining* in any event, and Member Kennedy would not apply the *Dixie Mining* reasoning beyond the facts of that case. Member Kennedy joined the majority decision in *Dixie Mining* only because he viewed the conclusions reached in that case warranted on the facts adduced under the limited scope of the record. Member Kennedy would limit that decision to the peculiar facts of that case.

cases the object of the Unions' conduct is not merely to require the prime contractors to make equalizing payments with respect to the work which they themselves subcontract and which might affect the work standards of their own employees, but they are also in the Unions' view responsible for the delinquent contributions which their subcontractors became responsible for while working for *other* persons, at *other* times, at *other* jobsites, as to all of which the prime contractors involved here may have had and probably did have no connection whatsoever, on behalf of employees not employed in the work unit for which the prime contractors here are responsible.[23] The jobs on which the subcontractors may have defaulted on the fringe benefit obligations may and probably do no longer exist, and quite likely involved other prime contractors more directly responsible with whom the pressured contractors here may never have had any contact, or who may no longer even be in business.

Thus, in the instant case, Riphagen had been receiving subhauling work from La Mirada since 1968. In 1972 only approximately 50 percent of the subhauling

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[23]This inquiry is the type which the Supreme Court ruled was necessary in *National Woodwork*. There the Court enunciated the principle that whether the contract and its enforcement violated Sec. 8(e) and 8(b)(4)(B).

> . . . cannot be made without an inquiry into whether, under all the surrounding circumstances,[38] the Union's objective was preservation of work . . . or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere.

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[38]As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted and the economic personality of the industry. See Comment, 62 Mich. L. Rev. 1176, 1185 *et seq.* (1964).

work which Riphagen performed was given him by La Mirada. The Union's claim that Riphagen was $11,000 in arrears on his payments to the fringe benefit funds is not confined to whatever delinquencies Riphagen might have incurred while doing business with La Mirada. La Mirada was never informed of precisely what the $11,000 amount represented. Obviously assuming a state of facts most favorable to Respondent, no more than half of the $11,000 could have accrued while Riphagen was working for La Mirada, if the delinquencies all occurred only during 1972. It is quite clear from a reading of the fringe benefit guarantee clauses in dispute herein, moreover, that that is precisely the intent of the clauses—to reach and impose liability for all delinquencies upon whoever may currently be doing business with the delinquent contractor. The scope of these clauses is immeasurably broader than those in *Dixie Mining*, where the coal mine operator had only to answer for the impact on his employees of his own subcontracting, and did not have to underwrite the harm caused to other work units by the contractual relationships between other persons over whom he had absolutely no control. But here, and in *Griffith*, the Union is in substantial part enmeshing prime contractors in ancient labor disputes of other employers as to work units with which they have no connection, at jobsites which may or may not still be in existence and with which the pressured contractors may or may not have had a connection, and with respect to delinquencies which may be or may not have been legitimately assessed.

In their *Griffith* opinion, the majority discloses their concern for the integrity of the trust funds, which they would protect for the benefit of the "interests

of employees of all employers." But only employees of signatory employers participate in those benefits, and we cannot imagine any clearer proof that the Unions are seeking to *aid union members generally across unit lines.* As the majority concedes, the Unions are separating the *benefits* from the bargaining units, and are requiring from the employers in each and every bargaining unit an indemnity for union members' benefits no matter where or for whom they work—an indemnity not tied to the maintenance of standards of the bargaining unit, but rather covering the entire industry to the extent of its *union organization.*

One other aspect of the majority's opinion in *Griffith* which causes us grave concern is the notion that employers and unions may do away with the secondary boycott provisions of the Act by private consensus. Section 8(e) prohibits the entering into of any contract whereby the employer agrees to cease doing business with any other person. Voluntarism is completely immaterial.[24] In this regard the majority misreads the Supreme Court's *National Woodwork* opinion, *supra.* The part of the opinion referenced by the majority lies within the Court's discussion, at pages 638-642, of whether *work preservation agreements* were intended to be proscribed by Congress under Section 8(e). But, earlier in its

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[24]Member Kennedy pointed this out in his dissents in the *Southern California Pipe Trades* cases, *supra.* Chairman Miller, while not viewing the facts in those *California Pipe* cases as establishing an agreement to cease doing business but rather as an agreement to resolve disputes as to legitimate damages for breach of agreement, agrees with Member Kennedy here (as pointed out in fn. 2, *supra*). In his view, the agreements here would create a liability for an amount of money wholly beyond the employer's control unless he ceased to do business with another entity, and thus are tantamount to agreements to cease doing business.

opinion, at pages 633-634, the Court clearly stated that Section 8(e) was enacted to close the loophole in the existing legislation whereby *secondary boycott agreements* themselves were not then unlawful under the Act. We quote:

> The Landrum-Griffin Act amendments in 1959 were adopted only to close various loopholes in the application of § 8(b)(4)(A) which had been exposed in Board and court decisions. We discussed some of these loopholes, and the particular amendments adopted to close them, in *Labor Board v. Servette, Inc.*, 377 U.S. 46, 51-54. We need not repeat that discussion here, except to emphasize, as we there said, that "these changes did not expand the type of conduct which § 8(b)(4)(A) condemned, that is, union pressures calculated to induce the employees of a secondary employer to withhold their services in order to force their employer to cease dealing with the primary employer." *Id.*, at 52-53.
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> Section 8(e) simply closed still another hoophole. In *Local 1976, United Brotherhood of Carpenters v. Labor Board* (*Sand Door*), 357 U.S. 93, the Court held that it was no defense to an unfair labor practice charge under § 8(b)(4)(A) that the struck employer had agreed, in a contract with the union, not to handle nonunion material. However, the Court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under § 8(b)(4)(A). *Section 8(e) was*

> *designed to plug this gap in the legislation by making the "hot cargo" clause itself unlawful.* The *Sand Door* decision was believed by Congress not only to create the possibility of damage actions against employers for breaches of "hot cargo" clauses, *but also to create a situation in which such clauses might be employed to exert subtle pressures upon employers to engage in "voluntary" boycotts.* Hearings in late 1958 before the Senate Select Committee explored seven cases of "hot cargo" clauses in Teamsters Union contracts, the use of which the Committee found conscripted neutral employers in Teamsters organizational campaigns. [Footnotes omitted.] [Emphasis supplied.]

As we have said, then, the issue is whether the clauses are to preserve work of unit employees, or whether the clauses reach neutral persons and are therefore secondary and unlawful. Since each type of contract is the product of an "agreement," logical analysis of this difference is aided not one whit by the voluntariness of the boycott, since by Section 8(e) Congress specifically interdicted secondary boycott *agreements.* It is the majority's semantics, not ours, which inject the irrelevancy. We acknowledge that the literal language of Section 8(e) does not provide for the work preservation exception which the Supreme Court held to be encompassed by Section 8(e). While in *National Woodwork* the Court upheld the legality of the agreement, it did so because the union had a primary dispute with its own employer over preserving its members' traditional work tasks which the employer in effect had contracted out. But the Court did not base its holding in any part on the employer's signature to the agreement.

We have expressed ourselves at length in this opinion in setting forth our analysis of why the particular provisions in issue in these cases are *not* directly related to the employees of these neutral contractors. We find that such agreements, however "voluntary," are directly violative of the law Congress passed, as it has been interpreted by the decisions of the highest court in the land. Congress has the power to alter the clear language of the statute and of the decisions of the Supreme Court, but until it does so, the majority decisions in both this case and in *Griffith* leave the Board floundering in the "Bramble Bush."

For the reasons set forth above, we find that the labor disputes caused by the fringe benefit delinquencies are too remote to the coerced contractors here and in *Griffith*, and that the impact of those disputes on the work units of the threatened contractors is oblique and does not make these pressured contractors primary persons to the disputes. We conclude that La Mirada and the pressured contractors in *Griffith* are in fact unoffending secondary persons within the meaning of *Denver Building Trades, supra*, and we would hold that the Respondent Unions have entered into and applied the contract provisions here and in *Griffith*, in violation of Section 8(b)(4)(ii)(A) and (B), and Section 8(e) of the Act.

Dated, Washington, D.C., June 28, 1974.

Edward B. Miller,
Chairman

Ralph E. Kennedy,
Member

NATIONAL LABOR
RELATIONS BOARD

APPENDIX F.

Order.

United States Court of Appeals, for the Ninth Circuit.

Griffith Company; J. W. Nicks Construction Co.; and Security Paving Co., Inc., Petitioners, v. National Labor Relations Board, Respondent. No. 74-2740.

Filed: Dec. 14, 1976.

Before: ELY and WALLACE, Circuit Judges, and RENFREW, District Judge.*

The petitioners will, and the respondent may, file a written response to the Petition for Rehearing filed by the Intervenor and the Trustees. Such responses shall be filed on or before December 24, 1976, and if the petitioners, as a group, and the respondent each file responses, each response shall consist of no more than fifteen printed or typewritten pages.

APPENDIX G.

Amendment of Opinion and Denial of Rehearing.

United States Court of Appeals, for the Ninth Circuit.

Griffith Company; J. W. Nicks Construction Co.; and Security Paving Co., Inc., Petitioners, vs. National Labor Relations Board, Respondent. No. 74-2740.

Filed: April 5, 1977.

Before: ELY and WALLACE, Circuit Judges, and RENFREW,* District Judge.

The Opinion filed in the above matter on November 4, 1976, is amended by addition of the following footnote on page 15, line 20, of the slip opinion after the word "necessary":

> 14. An example of a less coercive method was given tacit approval by the Supreme Court in Walsh v. Schlecht, No. 75-906 (U.S. Supreme Court, January 18, 1977).

The remaining footnotes will be renumbered.

The panel as constituted above has voted to deny the petition for rehearing; Judges Ely and Wallace have voted to reject the suggestion for rehearing en banc and Judge Renfrew has recommended rejection of the same.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.